82-1312

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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United States Court of Appeals,
Eleventh Circuit.

Sept. 17, 1982

No. 80-7641.

ALABAMA POWER COMPANY, Utah Power & Light Company, Pacific Gas & Electric Company, the Montana Power Company, Wisconsin Power & Light Company, and Pacific Power & Light Company, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

Petitions for Review of an Order of the Federal Energy Regulatory Commission.

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act (Act), 16 U.S.C.A. § 800(a) (West 1974). We affirm the decision of the Federal Energy Regulatory Commission.

I. BACKGROUND

The Federal Power Act, 16 U.S.C.A. § 791a et seq. (West 1974), authorizes the Federal Energy Regulatory Commission (once known as the Federal Power Commission) to license public and private entities for the purpose of developing water power projects.[1] Licensees may develop these projects on wa-

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[1] A "water power project" includes all facilities needed to harness the energy of flowing water to produce turbine generated electric energy.

ters over which the United States has jurisdiction, and may operate the projects for profit. A license is granted for a term of up to fifty years, at the expiration of which the United States may recover the project for its use or issue a new license to the same or a new entity. If the Commission grants a new entity a license, compensation must be paid to the original licensee for its "net investment" plus "severance damages."[2] This case involves a contest among potential licensees, including the present license holder, for a new license and presents the question of the preference due a municipal applicant.

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[2] The term net investment is defined at 16 U.S.C.A. § 796 (1974) to mean:

> (13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission. . . .

The term "severance damages" is explained in 16 U.S.C.A. § 807 as follows:

> (a) . . . [B]efore taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the

Section 7(a) of the Act provides in pertinent part: ". . . in issuing new licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, ..."[3] Section 15(a) also states that: ". . . the Commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license

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licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Chapter by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. . . .

[3] Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) provides:

> Sec. 7. *[As Amended August 26, 1935 and August 3, 1968.]* In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted,* or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800(a)] [Emphasis added.]

under said terms and conditions *to a new licensee*, ..." (Emphasis added.)[4]

The petitioners are thirty-eight privately owned utility companies licensed by the Commission to operate water projects.[5] The intervenors are publicly owned utilities that support the Commission's ruling.[6]

The competitors in this case are the City of Bountiful, Utah, a municipality, and Utah Power & Light Company, a private utility. Both entities applied for a license to operate the hydro-

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[4] Section 15 of the Federal Power Act provides:

> Sec. 15. *[As amended August 3, 1968.]* (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof. . . , the commission is authorized to *issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in section 14 hereof . . .: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

[5] The thirty-eight privately owned utility companies have categorized themselves for purposes of this case into three groups: the hydroelectric utility company group; Pacific Gas & Electric Co.; and Utah Power & Light Co., Montana Power Co., and Wisconsin Power & Light Co.

[6] The publicly owned utilities that have intervened to support the Commission's opinion are: the American Public Power Association; the City of Bountiful, Utah; the City of Santa Clara, California; and the Clark-Cowlitz Joint Operating Agency, Washington.

electric project operated by the private utility (Utah Power & Light) under a license which expired several years ago. The City of Bountiful, during the license contest, asked the Commission for a declaratory ruling clarifying its entitlement to the statutory preference in section 7(a). The Commission consolidated Bountiful's petition with that of another municipality that also sought a declaration of preference and initiated proceedings to resolve the issue.

Since only declaratory relief was requested, the Commission considered, as does this court, the issue to be one of statutory construction. The Commission issued two opinions on this matter. In its opinion and order declaring municipal preference applicable to hydroelectric relicensings, *City of Bountiful, Utah* (Opinion No. 88), No. EL78-43 (F.E.R.C. June 27, 1980), the Commission held:

> [T]he preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources.

The Commission found that the preference to states and municipalities only applied where the plans submitted by the states or municipalities were as "equally well adapted" as the plans submitted by citizens or corporations. In essence, the Commission held that the preference given to states and municipalities by section 7(a) of the Federal Power Act always applies regardless of the identity of the parties competing for reissuance of a license. The Commission stated, however, that a state or municipality would gain the benefits of this preference only in a "tie-breaker" situation. The Commission subsequently denied rehearing, *City of Bountiful, Utah* (Opinion 88-A), No. EL78-43 (F.E.R.C. June 27, 1980 [sic]), and petitioners brought this appeal.

II. JURISDICTION

At the outset, we are faced with a jurisdictional question. Although all parties to this proceeding urge us to reach the merits, we cannot do so if we lack the power to act because the issue is not ripe for judicial review. Since the Commission only ruled in a declaratory fashion, we must determine whether this case is ripe for review in the absence of a final ruling on a particular license application. The Commission has not granted a license to any of the parties to this proceeding, and since the rule announced by the Commission only applies in a "tie-breaker" situation, it is arguable that the ruling herein may never concretely affect any of these parties. Courts are reluctant to apply declaratory judgments to administrative determinations "unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). In explaining the ripeness doctrine, the Supreme Court stated that its basic rationale was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . ." 387 U.S. at 148, 87 S.Ct. at 1515. The Court also stated that the ripeness doctrine protects administrative agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49, 87 S.Ct. at 1515-16. The *Abbott* Court endorsed a two-step approach for analyzing ripeness which requires that we "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515.

The Supreme Court set forth four important factors to be used in making this evaluation. The four factors are:

(1) whether the issues presented are purely legal;

(2) whether the challenged agency action constitutes "final agency action," within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 704 (West 1977);

(3) whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and

(4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

Pennzoil Co. v. *FERC*, 645 F.2d 394, 398 (5th Cir. 1981), (quoting *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18). A complete recitation of the factors supporting our conclusion is unnecessary. After full consideration, we find that the issue presented is purely legal, that the challenged agency action will have a direct and immediate impact upon the petitioners, the states, and all potential applicants, as well as the workload of the Commission. We further conclude that resolution of this issue now will foster effective enforcement and administration by the agency. The issue is ripe for judicial review. Having resolved this jurisdictional issue, we turn to the merits.

III. MUNICIPAL PREFERENCES: "NEW" v. "ORIGINAL" LICENSES

Petitioners contend that when Congress provided in section 7(a) of the Federal Power Act, 16 U.S.C.A. § 800(a) (West 1974), that the Commission give a relicensing preference to states and municipalities "in issuing licenses to new licensees under section 15 hereof," it intended the preference to be given to "new licensees" as defined in section 15, 16 U.S.C.A. § 808 (West 1974). They further posit that section 15 distinguishes the term "new licensee" from the phrase "original licensee." Because Congress clearly differentiated between the two terms, petitioners argue that it could not have intended the words "new licensee" to include the holder of the expired license. Thus, petitioners assert that the relicensing preference in section 7(a) is inapplicable to original licensees, but applies only to applicants seeking to acquire the project for the first time. The petitioners contend that the Commission clearly erred in interpreting section 7(a) because it necessarily concluded that Congress meant "any" when it said "new" in the Act.

We must determine whether in issuing licenses to new licensees under section 15 of the Act the Commission must apply a preference in favor of municipalities and states against all competing applicants or whether the preference applies only when the competing applicants are persons or entities other than the original licensee.

Section 7(a) provides a preference for states and municipalities in three situations:

(1) In issuing preliminary permits;

(2) in issuing licenses where no permit has been issued; and

(3) in issuing licenses to new licensees under section 15.

We are concerned only with the third situation. The petitioners urge that we apply the plain meaning of the words "new licensees," as defined in the statute. They contend that the Commission erred in relying on the legislative history of the term "new licensees" cautioning that legislative history is relevant only if the term has no plain meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

We agree with petitioners that statutory interpretation must begin with the language of the statute which must be interpreted in accordance with its "plain meaning." *Fitzpatrick* v. *IRS*, 665 F.2d 327 (11th Cir. 1982); *United States* v. *Anderez*, 661 F.2d 404 (11th Cir. 1981). We should depart from the official text of the statute and seek extrinsic aid for ascertaining its meaning only if the language is unclear or if apparent clarity leads to absurd results when applied. *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982). On the other hand, a reviewing court generally should adhere to the construction of a statute made by the agency charged with its execution unless there are compelling reasons indicating such construction is wrong. *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668 (5th Cir. 1981). In *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534,

60 S.Ct. 1059, 84 L.Ed. 1345 (1940), the Supreme Court emphasized that where the plain meaning leads to results that are absurd or at variance with the policy of the enactment, a reviewing court may seek guidance wherever available. The Court stated:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted).

Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

The Commission must act in each of the three licensing situations outlined above. As to all three, the Act clearly gives two different preferences. First, the Act gives a preference to states and municipalities when their plans are "as equally well adapted" as those of a private applicant. Second, the Act gives a preference as between applicants other than states and municipalities for plans best "adapted to develop, conserve, and utilize in the public interest the water resources of the region." These preferences cover all situations concerning competing applications. To follow the petitioners' theory of a "limited preference" in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a "limited preference" advantages incumbent licensees and thus leads to an

absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference.

In finding that the state and municipal preference applies to all cases, the Commission properly relied heavily upon legislative history because the plain meaning advanced by petitioners leads to absurd results. The evidence on which the Commission relied included:

(1) A memorandum which was used in preparation of the Act, written on October 31, 1917 by Mr. O. C. Merrill, conceded by all parties to be an authority;[7]

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[7] Among the materials relied on by the Commission was a memorandum written on October 31, 1917, by O. C. Merrill, which explained the objectives of the municipal preference. The memo, in pertinent part, provided:

> Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. *In such disposition the order of preference should be as follows: (1) the United States—to acquire* properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy.

(2) testimony of witnesses for power companies before congressional committees;[8]

(3) the fact that the House-Senate Conference Committee rejected a bill proposed by the Senate, which contained a different preference from that under examination, and the fact that the conference committee accepted the House bill which provided the present preference;

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[8] The Commission also relied upon testimony before the House Special Committee where a witness for private industry supporting the bill stated: (Hall is the witness.)

> MR. CANDLER. Now then you do understand that under this bill the Government of course has the first right to retake the property?
>
> MR. HALL. Yes, sir.
>
> MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?
>
> MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.
>
> MR. CANDLER. *Then the original licensee would have only the third opportunity to count on his lease.*
>
> MR. HALL. *That is the way I understand it.* . . .[Emphasis added.]

The Commission also relied on a conversation between a member of the House Committee and the Secretary of the Interior at Special Committee Hearings. That colloquy was:

> Mr. Hamilton. Mr. Secretary, I understood you to say that as between the original licensee and another, assuming there is a licensee who is a bidder at the end of 50 years, as between him and the other bidder, you would give the preference to the original licensee?
>
> Secretary Lane. At the same figure.
>
> Mr. Hamilton. Would you give that preference to the original licensee, assuming that the other bidder was a municipality?
>
> Secretary Lane. I do not think I would.

(4) correspondence between persons interested in the bill such as Gifford Pinchot, President of the National Conservation Association, and writings of O. C. Merrill.[9]

Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.

We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation. The Supreme Court has announced

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[9] The Commission also relied upon a letter of Gifford Pinchot, President of the National Conservation Association, to the Chairman of the Committee on Commerce, which stated, in part:

> The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof," or words of like import.

Letter from Gifford Pinchot to Senator Jones (June 25, 1919), *reprinted in City of bountiful, Utah*, slip op. at 28.

Section 7 of the bill was then changed to include the Pinchot language.

> In the development of water power by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.

The Commission also relied upon the writings of O. C. Merrill, who shortly before the President signed the bill, explained the preference section as follows:

> For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

Memorandum from O. C. Merrill to President Wilson (June 8 or 9, 1920), *reprinted in City of Bountiful, Utah*, slip op. at 31.

the rule that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .' " *CBS, Inc.* v. *FCC*, 453 U.S. 367, 382, 101 S.Ct. 2813, 2823, 69 L.Ed.2d 706, 720 (1981). The Fifth Circuit has also applied this principle in reviewing FERC decisions. *Falcon Petroleum* v. *FERC*, 642 F.2d 780, 783 n.3 (5th Cir. 1981). We are aware of petitioner's assertion that the Commission has inconsistently interpreted section 7(a), but dismiss this argument as insubstantial and speculative. The statutory interepretation urged by petitioners is outweighed by Commission interepretations, even if inconsistent, not based upon activities contemporaneous with passage of the statute.

CONCLUSION

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 88

City of Bountiful, Utah	)	
Utah Power and Light Company	)	**Docket No. EL78-43**
City of Santa Clara, California	)	
Pacific Gas and Electric Company	)	

OPINION AND ORDER DECLARING MUNICIPAL PREFERENCE APPLICABLE TO HYDRO-ELECTRIC RELICENSINGS

Issued: June 27, 1980

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

MUNICIPAL PREFERENCE

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr.,
and George R. Hall.

City of Bountiful, Utah)
Utah Power and Light Company) **Docket No. EL78-43**
City of Santa Clara, California)
Pacific Gas and Electric Company)

OPINION NO. 88

OPINION AND ORDER DECLARING MUNICIPAL PREFERENCE APPLICABLE TO HYDRO-ELECTRIC RELICENSINGS

(Issued: June 27, 1980)

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INTRODUCTION

On June 10, 1920, President Wilson signed the Federal Water Power Act (FWPA), terminating a controversy between private power interests and conservationists that was equal in many respects to the recent and current controversies involving our nation's other energy resources. That Act created the Federal Power Commission and authorized it, among other matters, to issue licenses not exceeding 50 years for the development of our nation's water power resources. The first paragraph of Section 7 of the FWPA directed the Commission[1] to give preference to applications of "States"[2] and "Municipalities"[3] in certain situations. Although President Wilson's signature terminated the one controversy, at least for the time being, it initiated the principal controversy in this proceeding—whether that State and municipal preference applies in a *re*licensing proceeding against a licensee that has

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[1] The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

[2] The term "State" was defined in Section 3 of the FWPA and is defined in Section 3(6) of the Federal Power Act to mean "a State admitted to the Union, the District of Columbia, and any organized Territory of the United States".

[3] The term "Municipality" was defined in Section 3 of the FWPA and the term "municipality" is defined in Section 3(7) of the Federal Power Act to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power".

applied for a successor license and is not itself a State or municipality.[4]

The significance of that controversy is essentially one of the cost to States and municipalities of acquiring generating capacity, and the correlative cost to citizens and corporations of losing generating capacity. The proviso of Section 14(a) of the Federal Power Act (FPA), which was also embodied in Section 14 of the FWPA, states,

> That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation

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[4] Section 4(e) of the Federal Power Act, which was Section 4(d) of the FWPA, authorizes the Commission to issue licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality. . . ." The term "Corporation" was defined in Section 3 of the FWPA to mean

> a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

That term was modified in 1935 to include other forms of business organization and, therefore, the term "corporation" is defined in Section 3(3) of the Federal Power Act to mean

> any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined . . .

In the context of Section 4(e) which authorizes the Commission to issue licenses to (1) citizens (including throughout this Opinion and order associations of citizens), (2) domestic corporations, (3) States and (4) municipalities, the issue is whether the State and municipal preference applies in a relicensing proceeding against a citizen or corporation licensee-applicant.

> proceedings upon payment of just compensation is hereby expressly reserved.

Accordingly, States and municipalities can acquire licensed projects for public purposes pursuant to their right of eminent domain whenever they are willing to pay the *value-related* price which is constitutionally known as "just compensation". But, to the extent that States and municipalities have a right upon relicensing to acquire projects that were previously licensed to citizens and corporations, they would be able to acquire licensed projects at those times whenever they are willing to pay the *cost-related* price which is embodied in the "net investment" concept of the FPA. That concept refers essentially to the cost of the project, reduced by the recovery of that cost through earnings (principally in the form of accumulated depreciation) in excess of a fair return, during the term of the previous license. That price could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

The first paragraph of Section 7 of the FWPA was reenacted in 1935 with one substantive change[5] as Section 7(a) of the FPA.[6] For convenience, and since there is no material substantive difference between the two provisions, the present

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[5] The "equally well adapted" and "best adapted" standards were modified to eliminate the words "navigation and" preceeding "water resources of the region". The modifications are not material to this proceeding because, as discussed *infra*, no factual issues pertaining to specific projects are to be resolved.

[6] Section 7(a) of the FPA as so enacted reads,

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the

designation, "Section 7(a)", is sometimes used herein to refer to the first paragraph of Section 7 of the FWPA in contexts prior to August 26, 1935, as well as to Section 7(a) of the FPA in contexts on and after that date.

Since the vast majority of initial licenses under the two Acts were issued for the maximum term of 50 years, the Commission has had only one occasion to consider the applicability of the municipal preference[7] in a contested proceeding in which an investor owned utility, or private power interest[8], had applied for a successor license. In that case, Carolina Power & Light Company (Carolina Power), the licensee of the Walters Hydroelectric Development, Project No. 432, applied on August 7, 1973, for a new license for that project; and North Carolina Electric Membership Corporation (NCEMC) applied a year later on August 20, 1974, for an essentially identical license for the same project.[9] An administrative law judge decided, first,

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region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

[7] The term "municipal preference" will refer to the first preference of Section 7(a) to applications of States and municipalities, and should be distinguished from the second or "best adapted" preference of Section 7(a), "between other applicants".

[8] State and municipal units for developing electric power are sometimes called "public power" in a collective context, and investor owned utilities are sometimes called "private power" in contradistinction. Accordingly, this controversy over the applicability of the municipal preference in relicensing situations is said to be one between public and private power interests. Cooperatives are part of "private power" in this context because they are not included within the definitions of "State" and "municipality".

[9] NCEMC's application was designated Project No. 2748, which was simply the assignment of a docket number. The new number did not signify a different "project", or unit of improvement or development, within the meaning of Section 3(11) of the FPA.

that NCEMC was not a "State" or "municipality" and could not therefore qualify for the municipal preference, and second, that the municipal preference is restricted "to situations where the original licensee does not seek renewal". In Opinion No. 757, issued March 22, 1976, the Commission affirmed his ruling that NCEMC could not qualify for the municipal preference and said that in view of that decision it would not be appropriate to address the applicability of the municipal preference at this time:

> This issue should be addressed in a proceeding where there are parties who will be affected by the application of the preference issue.[10]

At the time of the Commission's decision, the City of Bountiful, Utah (Bountiful), a municipality, and Utah Power and Light Company (UP&L), a corporation, had pending applications under Section 15(a) of the FPA for a new license for UP&L's Weber River Project (UP&L's Project No. 1744 and

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[10] The Commission has applied Section 7(a) in one other relicensing decision. Escondido Mutual Water Company, a not-for-profit corporation controlled by the City of Escondido, California, applied on April 1, 1971, for a new license for Project No. 176, which application was adopted by the City of Escondido as its own on November 25, 1975. Although five Bands of Mission Indians claimed that they were entitled to the municipal preference, the Commission found (Opinion No. 36, issued February 26, 1979, mimeo, at 74, n. 105) that they were not "municipalities" and, consequently, it did not reach the preference issue (mimeo, at 81 and 206). The Commission declined to issue a power or non-power license to the five Bands, and issued a new license to Escondido Mutual Water Company (a corporation), the City of Escondido (a municipality) and Vista Irrigation District (another municipality), as joint licensees, without otherwise reaching the preference issue. The Commission said (mimeo, at 81),

> Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

Bountiful's Project No. 2747). Similarly, the City of Santa Clara, California (Santa Clara), another municipality, and Pacific Gas and Electric Company (PG&E), another corporation, had pending applications for a new license for PG&E's Mokelumne River Project (PG&E's Project No. 137 and Santa Clara's Project No. 2745). On July 21, 1978, more than two years after the Commission's decision on Carolina Power's Walters Hydroelectric Development, Bountiful filed a petition requesting the Commission to issue a declaratory order that it is entitled by Section 7(a) to a preference against UP&L when the Commission issues a new license for the Weber River Project. And on August 15, 1978, Santa Clara similarly filed a petition for a declaratory order that it is entitled to such a preference against PG&E when the Commission issues a new license for the Mokelumne River Project. The Commission, on September 27, 1978, issued notice of the filing of the two petitions and their consolidation under Docket No. EL78-43.

Petitions to intervene in support of Bountiful (I)(R) and Santa Clara (I)(R) were filed by The American Public Power Association (I)(R)[11], Clark-Cowlitz Joint Operating Agency (I)(R)[12], Northern California Power Agency[13] and the City of Shawano, Wisconsin. In addition, petitions to intervene in support of UP&L (I) and PG&E (I)(R) were filed by PP&L, Carolina Power (I)(R), The Montana Power Company (I)(R),

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[11] The American Public Power Associaton (APPA) is a national service organization of more than 1,400 consumer-owned utilities, including municipalities, State power authorities and districts, cooperatives and others.

[12] The Clark-Cowlitz Joint Operating Agency (JOA) is a municipality that was established in 1976 to compete for Pacific Power & Light Company's (PP&L's) Merwin Project (PP&L's Project No. 935 and JOA's Project No. 2791).

[13] Northern California Power Agency is a joint action entity consisting of the municipalities of Alamenda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, California.

Wisconsin Power and Light Company (I), Georgia Power Company, Niagara Mohawk Power Corporation, the International Brotherhood of Electrical Workers (IBEW) and the Hydro-electric Utility Company Group (I)(R).[14] A notice of intervention was also filed by The People of the State of California and the Public Utilities Commission of the State of California. All of the foregoing subsequently were permitted to participate in the proceeding. On May 3, 1979, the Commission

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[14] The Hydro-electric Utility Company Group (Hydro Group) is an *ad hoc* group of the following 34 electric utility companies associated for the purpose of this proceeding:

Virginia Electric & Power Company
Alabama Power Company
Minnesota Power & Light Company
Southern California Edison Company
Public Service Electric & Gas Company
Appalachian Power Company
Pennsylvania Power & Light Company
Baltimore Gas & Electric Company
Washington Water Power Company
Jersey Central Power & Light Company
Pennsylvania Electric Company
York Haven Power Company
Carolina Power & Light Company
New England Power Company
Georgia Power Company
Duke Power Company
Niagara Mohawk Power Corporation
Northern States Power Company
Union Electric Company
Central Maine Power Company
Idaho Power Company
Wisconsin Electric Power Company
New York State Electric and Gas Corporation
Louisville Gas & Electric Company
Connecticut Light & Power Company
Hartford Electric Company
Western Massachusetts Electric Company
Holyoke Water Power Company

fixed a briefing schedule and the participants designated by "(I)" and "(R)", together with the Commission staff counsel, filed initial and reply briefs, respectively. In addition, the IBEW submitted a statement.

In our order of May 3, 1979, we indicated that our inquiry in this proceeding into the Section 7(a) municipal preference would be limited to two purely legal issues of statutory construction, as follows:

(1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing proceeding under section 15 of the Act against an original licensee that is neither a state nor a municipality?

(2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

We indicated, additionally, that we would *not* decide any factual issues under Section 7(a) pertaining to specific projects, such as whether a particular applicant's plans are (or within a reasonable time are made) as well adapted as another's plans to "conserve and utilize in the public interest the water resources of the region", and in particular that we would not decide whether Bountiful or Santa Clara is entitled to the municipal preference, if it is applicable. We said that their entitlement should be resolved in the separate relicensing proceedings in which they are parties. In view of the importance and complexity of the issues, we scheduled them for oral argument on February 22, 1980.

South Carolina Electric & Gas Company
Arkansas Power & Light Company
Public Service Company of Indiana
Puget Sound Power & Light Company
Portland General Electric Company
Pacific Power & Light Company

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians* v. *Federal Power Commission, infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

Having considered the briefs and the oral argument of February 22, 1980, we have concluded and declare, for the reasons discussed herein, that the preference of Section 7(a) of the FPA favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. We have also concluded and declare that States and municipalities are entitled to a preference only when the Commission determines, in the exercise of its judgment, that their plans, and any competing plans of citizens or corporations for the same water resources, are equally well adapted to conserve and utilize in the public interest the water resources of the region.

THE "NEW LICENSEES" CONTROVERSY

The controversy in this proceeding focuses on the meaning of the words "new licensees" in the phrase "in issuing licenses to new licensees under section 15 hereof". The public power interests and the Commission staff counsel contend that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license) and, therefore, that a *new licensee* plainly is *any licensee* under a new license. In other words, the *new licensee* might be the licensee under the original or annual license, or any citizen, corporation, State or municipality that was a stranger to the original license and is eligible under Section 4 to become a licensee. Under their interpretation, in issuing new licenses under Section 15 *to any*

applicant for a license, the Commission is directed by Section 7(a) to give preference to States and municipalities, subject to a finding of equally well adapted plans.[15]

The private power interests do not dispute the contention that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license). But they contend that Section 15(a) carefully distinguishes between new licenses that are issued to "original licensees" and new licenses that are issued to "new licensees"[16] and, there-

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[15] Santa Clara reads Section 7(a) as though it states,

> . . . . in ~~issuing~~ *determining whether to issue* licenses to new licensees under section 15 hereof. . . .

As discussed *infra*, under APPLICABILITY OF SECTION 7(a) TO RELICENSINGS - Plain Meaning, the words "original" and "new" were used in Section 15 of the FWPA and are used in Section 15(a) of the FPA as correlative terms to describe a predecessor/successor relationship in a context of successive license terms. In that context, a "new" license or licensee is a *successor* license or licensee, and an "original" license or licensee is a *predecessor* license or licensee.

[16] Section 15 of the FWPA was redesignated without change in 1968 as Section 15(a) of the FPA. It states:

> That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a *new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a *new license* under said terms and conditions *to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then

fore, that a *new licensee* as used in Section 7(a) plainly is *any licensee except an original or predecessor licensee.*[17] Under their interpretation, the Commission does not get to the threshold of issuing new licenses under Section 15 to *new licensees* unless the original licensee chooses not to file an application for a new license, or unless the Commission first decides not to issue a new license to the original licensee. They say that in issuing new licenses under Section 15 to *any licensee except an original licensee* the Commission is directed by Section 7(a) to give preference to applications of States and municipalities and, conversely, that the municipal preference does not apply against an original licensee.

The public power interests focus their argument on the legislative history of Section 7(a), claiming that the drafters intended to include a broad municipal preference on relicensing, that the preference was included without question in the initial legislative bill, that the subsequent modifications were for clarification rather than change of concept and, consequently, that a broad municipal preference on relicensing remained

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licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

It should be noted that the proviso refers incorrectly to the "United States" (rather than the Commission) issuing a license, and refers not consistently to the issuance of a "license to a new licensee" or a "*new* license to the original licensee" (emphasis added). The Third Circuit said, in this connection, in *Metropolitan Edison Company* v. *Federal Power Commission*, 169 F.2d 719 (Third Cir., 1948), at 723,

> To put it bluntly, there are hiatuses and inconsistencies in the Federal Power Act and, as was stated by Judge Learned Hand in Niagara Falls Power Co. v. Federal Power Commission, 2 Cir. 137 F.2d 787, 795, * * * it is necessary * * * to break through the band of verbal logic at its weakest spot."

[17] They remind us that licensing under the FWPA and the FPA grew from a leasing concept, and that when a tenant enters into a *new lease* he remains the *original* tenant and does not become a *new* tenant. In other words, his status as a tenant doesn't change, and a *new* tenant would be anyone else. (But see note 44, *infra.*)

in the final bill enacted by Congress and signed by President Wilson. The private power interests, on the other hand, stress the *plain meaning* of "new licensees" derived from Section 15(a) and other provisions, claiming that it is not necessary to resort to the legislative history. They also stress a favorable 1968 interpretation of the General Counsel of the Commission that was transmitted through Chairman White to Congress, claiming that Congress approved that interpretation at that time.

LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT

Jerome G. Kerwin's *Federal Water-Power Legislation* (Columbia University Press, 1926) discusses the economic and legal aspects of water power and is perhaps the most widely recognized authoritative text discussing the legislative history of the FWPA. See, for example, *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 (1965), and *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, *infra*. A considerably shorter and less detailed history was written by Gifford Pinchot and published in the George Washington Law Review in 1945.

The events leading to the FWPA can be separated into two periods. The first period ended in 1917 after the hearings and debates on the early water power bills, and can be characterized as the formative period. The second period, which can be characterized as the legislative period, began in 1917 with the formalization of the final concept of the FWPA, and covers its movement through Congress.

The Formative Period (1890-1917)

According to Kerwin, the first hydro-electric plant was constructed in 1890 and, thereafter, the development of hydro-electric power proceeded at a rapid pace. But it did not proceed fast enough to suit the private power interests. They encountered problems with legislation enacted under the commerce power to keep open the lanes of navigation. And they

encountered opposition from an anti-monopoly conservation movement with respect to their use of the extensive government lands in the western States.

The Rivers and Harbors Act of 1890 prohibited the creation and maintenance of unauthorized obstructions to the navigable capacity of waters within the jurisdiction of the United States. An extension of that Act in 1899 prohibited the construction of dams in navigable waters of the United States without the consent of Congress and the approval of plans by the Chief of Engineers and the Secretary of War.

Prior to 1896, water power sites on government lands were practically given away as homesteads or by sale. According to Kerwin, they passed from government to private ownership as rapidly as the private power interests could "grab" them. In 1896 the Secretary of the Interior was authorized to issue permits to use rights-of-way not exceeding 40 acres for the purpose of generating, manufacturing or distributing electric power. That authority was broadened in 1901 and 1911; but since the permits were revocable at will and were required to be issued under general regulations that did not permit special arrangements, the private power interests were not satisfied.

In 1898 Pinchot became Chief of the Division of Forestry of the Department of the Interior. He states that Federal water power policy began in 1905 when the responsibility for national forests was transferred to the Department of Agriculture, and the new Forest Service, which he headed, chose to develop its own policy. He wrote in 1945, 14 George Washington Law Review, at 12,

> There was no question which course to adopt. We must make our own policy and *above all keep the title to the power sites in the public hands.* [Emphasis added.]

Pinchot's policy of keeping the title to power sites in the public hands at some level of government is embodied in the recapture and municipal preference provisions of the FWPA and the FPA. His views that private power interestss were "water power grabbers" who were "eager for plunder" are discussed

in *Chemehuevi Tribe of Indians* v. *Federal Power Commission* (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n. 54.

In 1908 a bill was passed and presented to President Roosevelt to extend the time for constructing a power dam on the Rainy River (a Canadian boundary stream). President Roosevelt vetoed the bill and proclaimed, in a landmark veto message,

> Every permit to construct a dam on a navigable stream should specifically recognize the right of the Government to fix a term for its duration and to impose such charge or charges as may be deemed necessary to protect the present and future interests of the United States . . . .
>
> * * *
>
> In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:
>
> * * *
>
> Fifth. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at the *time*.

The following year President Roosevelt vetoed the James River bill, repeating the substance of his landmark message. According to Kerwin, the conservationist water power policy promulgated in President Roosevelt's two veto messages resulted from the influence of Chief Forester Gifford Pinchot and one Henry Graves. In 1910 President Taft dismissed Pinchot for insubordination after Pinchot publicly criticized Secretary of the Interior Ballinger.

In the meanwhile, the General Dam Act of 1906 fixed the conditions upon which Congress would consent, by special legislation, to the construction of dams in navigable waters of the United States. The General Dam Act of 1910 replaced its 1906 counterpart and provided for 50-year permits that were revocable for cause and subject to takeover by the United

States on payment of reasonable value. But there was no provision for disposition of the properties at the end of the term, and only 8 of the 29 dams authorized under the two Acts were completed.

In June 1914 the Adamson bill pertaining to water power on navigable streams was introduced in the House and assigned to the Committee on Interstate and Foreign Commerce. After hearings, that bill was reported out of the committee and, following a House debate, was amended into a conservation measure and adopted. In May 1914 the Ferris bill pertaining to water power on government lands was introduced in the House and assigned to the Committee on Public Lands. After hearings, that bill was reported out of the committee, adopted by the House and sent to the Senate. After further hearings, the Senate Committee on Public Lands struck everything but the enacting clause and substituted the Myers bill favorable to private power interests. With respect to water power on navigable streams, the Senate stood behind the Shields bill, which was introduced in December 1915 and was also favorable to private power interests. The principal divisive issues pertained to charges for power privileges and recapture. President Wilson tried and failed to cause water power legislation to be enacted prior to the entry of the United States into World War I.

The most important thing to understand about the formative period is that it ended with a general understanding that if the nation's water power resources were to be preserved for the public, it would be necessary to place a time limit on a private lessee's or licensee's use of the resources, and enact nothing which would, in effect, give a right of perpetual use to a private lessee or licensee.

The Legislative Period (1917-1920)

The hearings and debates on the early water power bills provided forums in which the competing interests sharpened and resolved issues. One seemingly insoluble problem, however, was the superabundance of committees with jurisdiction

over some face of water power legislation—Public Lands, Indian Affairs, Agriculture, Military Affairs, Interstate and Foreign Commerce, Foreign Affairs and Rivers and Harbors.

In 1917 the Secretaries of Agriculture, the Interior and War caused an interdepartmental committee to be formed to draft a water power bill treating both navigable waters and government lands; and Oscar Charles Merrill, Chief Engineer of the Forest Service since 1905, was designated as the committee member from the Department of Agriculture.[18] That committee drafted a bill that was presented to President Wilson and approved by him and the three Secretaries just before the Christmas holidays in 1917. Just after those holidays the President presented the so-called Three Secretaries Bill, or Administration Bill, to certain House committee chairmen and requested the formation of a special Committee on Water Power to get that bill through Congress. The committee was authorized and, on January 15, 1918, the bill was introduced by Congressman Raker in the 65th Congress, 2d Session, as H.R. 8716.

The hearings of the Committee on Water Power lasted from March 18 to May 15, 1918, during which period Congress was preoccupied with World War I. H.R. 8716, which was treated as a substitute for the Shields bill, S. 1419, was reported out of the committee with changes, debated and changed further in the House, and passed by the House. The bill reached the Senate on September 19, 1918, and was referred to conference on September 30, 1918. The report of the conference was

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[18] In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953), at 305, n. 10, the Supreme Court accepted Merrill's testimony before the House Committee on Water Power as presenting the views of the Secretaries of Agriculture, the Interior and War. Merrill remained in government after Pinchot's 1910 discharge and thus was in an influential position to continue Pinchot's policies. His role in developing the FWPA is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well as to the President and his Cabinet.

introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died.

A similarly composed special Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and the bill was reported out of the committee. The House and Senate both passed H.R. 3184 with changes, and on January 17, 1920, sent it to conference. Finally, the report of the conference was approved by the House and Senate, and H.R. 3184 was sent to the President on May 31, 1920, shortly before Congress adjourned, and signed by him in time to avoid a pocket veto.

LEGISLATIVE HISTORY OF SECTION 7

Merrill prepared a memorandum dated October 31, 1917, of the principles that were to be embodied in the Administration Bill, stating in pertinent part,

> At the termination of license United States to have right to take over the plants [sic] or plants covered by the license, or to transfer them to a State or municipal corporation applying therefore, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations.
>
> Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy. In any event,

> freedom of action in this respect should not be fore-closed by legislation at the present time.

The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

Thereafter, Merrill drafted a bill which stated in a proviso to Section 15, consistent with the memorandum,

> That in issuing such new license, the original licensee shall have a preference right over any other applicant therefor, *except a State or a municipality*. [Emphasis added.]

The hearings and debates on the early water power bills produced proponents of a relicensing preference for initial licensees. Merrill's draft contained what was apparently the penultimate appearance of such a preference prior to the enactment of the FWPA and shows clearly that original licensees were *not* to be preferred over States and municipalities. The proviso was removed from the Administration Bill prior to its introduction in Congress, thus eliminating the original licensee's preference over other private applicants, but not the municipal preference against private original licensees (which was in the first paragraph of Section 7).

The committee of the Departments of Agriculture, the Interior and War (of which Merrill was a member) finalized Merrill's draft and presented the finalized version to the three Secretaries who, on December 14, 1917, transmitted it to President Wilson. Later that month the President presented it to certain House committee chairmen and used his influence to cause them to form a special Committee on Water Power. The Administration Bill was introduced on January 15, 1918, as H.R. 8716, and provided in the first paragraph of Section 7:

> That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation

> and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.[19]

We observe that in the light of Merrill's memorandum dated October 31, 1917, and the absence of any words restricting the municipal preference to initial licensings, it is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all *re*licensings, as well as all initial licensings. Some of the private power interests argue, however, that the municipal preference expressed therein applied only to initial licensings because it was conditioned on a Commission finding of "plans" being adapted to the purposes indicated, which refers to the licensing of new projects. But since Section 4 then as now authorized the issuance of licenses for the construction, operation and maintenance of project works, the finding clearly applied to plans for operation and maintenance as well as plans for construction. Similarly, the reference to "developing power" does not limit the municipal preference to initial licensings because those words can mean "generating power" as well as "constructing facilities for generating power".

During the course of the hearings of the Committee on Water Power certain representatives of private power interests indicated that they were reconciled to the proposition of a municipal preference against original licensees. For example, E. K. Hall, Vice President of the Electric Bond & Share Company, and a leading spokesman for private power, testified,[20]

> MR. CANDLER. Now then do you understand that under this bill the Government of course has the first right to retake the property?

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[19] House Report No. 715, 65th Congress, 2d Session, dated June 28, 1918.

[20] Ellen Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act*, 1966, at 459c.

MR. HALL. Yes, sir.

MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the [sic., other?] licensees might be preferred over the first licensee?

MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

MR. CANDER. Then the original licensee would have only the third opportunity to count on his lease.

MR. HALL. That is the way I understand it . . . .

On the other hand, at one point in those hearings Congressman Sims, Chairman of the Committee on Water Power, expressed his view that the Administration Bill did not contain a municipal preference that was applicable to relicensings. (Dove, at 509).[21]

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[21] Dove, at 509:

The CHAIRMAN. Mr. Secretary, it has been very seriously urged before the committee as a part of the recapture provision that we provide that if the United States Government did not want to avail itself of the recapture provision that a State or municipality which wanted the water power for State or municipal purposes should have the second opportunity and the preference over a private licensee.

Secretary LANE. I think that was in one of the bills, was it not?

The CHAIRMAN. It is not in this one.

Secretary LANE. It seems to me that is a very reasonable proposition.

Mr. FERRIS. I think that is a proposition which has been advanced by Mr. Taylor of Colorado.

Mr. TAYLOR. Yes. I have always very emphatically insisted that they should have a preference right over corporations or over private individuals to take over not only water power, but coal mines and other things for the purpose of preventing extortion in towns and cities, and I hope that when we get through with this legislation that provision will be in here and that it will meet with your approval. I am earnestly hoping that if the Government itself does not see fit and desire to take over these

During the course of those hearings Merrill suggested an amendment to the municipal preference of Section 7 (Dove, at 444) to carry out the purpose of Section 5 of "maintaining priority of application for a license" for citizen and corporate holders of preliminary permits who had expended funds investigating water power sites. On June 28, 1918, the Committee on Water Power committed the bill to the Committee of the Whole House,[22] at which time the first paragraph of Section 7 provided,

> That in issuing *preliminary permits or* licenses hereunder, the commission may in its discretion give preference to applications ~~for licenses~~ *therefor* by States and municipalities ~~for developing power for State and municipal purposes~~, provided the plans for the same are deemed by the commission to be *best* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.[23]

We observe that the amendment appears to have extended the municipal preference of Section 7 to the issuance of preliminary permits, but does not appear to have eliminated that preference with respect to the issuance of licenses pursuant to outstanding preliminary permits, as Merrill had suggested. Additionally, the amendment appears to have eliminated any limitations on that preference that might have been implicit in the phrase "for developing power for State and municipal

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matters at the expiration of the 50 years, the preference right shall be given first to the municipalities or states and second to the occupant or the licensee.

In context, because of the absence of an express reference in Section 7 to relicensings, Chairman Sims may have failed to realize that the language of the provision was broad enough to include relicensings.

[22] House Report No. 715, 65th Congress, 2d Session. The Administration Bill was treated as an amendment of the Shields bill, S. 1419.

[23] Additions are *[italicized]*; deletions are expunged.

purposes", and to have applied the *best adapted* standard of the second preference to the municipal preference. *But there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

On the floor of the House, Congressman Doremus proposed an amendment to Section 7 (Dove, at 623) to make the municipal preference mandatory instead of discretionary, except insofar as the Commission would have to determine in its discretion whether the plans of a State or municipality were adapted to conserve and utilize in the public interest the navigation and water resources of the region. His proposal was adopted and, as approved by the House on September 5, 1918, Section 7 provided,[24]

> That in issuing preliminary permits or licenses hereunder the commission ~~may in its discretion~~ *shall* give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission ~~to be best~~ adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may ~~likewise~~ give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

We observe that in addition to making the municipal preference mandatory, although subject to a finding in the discretion of the Commission, the words "to be best" were deleted so that States and municipalities would not be required to submit

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[24] S. 1419, 65th Congress, 2d Session, as printed September 6, 1918.

The debate on the floor of the House (Dove, at 623-5) shows clearly that the Commission would have discretion in administering the municipal preference. Congressman Doremus said,

> You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

plans that were better than those of citizens and corporations. The word "likewise" was deleted as being "not necessary" in view of the change to the municipal preference. *There still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

The House-approved bill was referred by the Senate on September 19, 1918, to a conference, where it stalled. On February 26, 1919, the conference reported a bill[25] in which Section 7 was changed to read,

> That in issuing preliminary permits *hereunder* or licenses ~~hereunder~~ *where no preliminary permit has been issued* the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission *equally well* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The explanation of the foregoing changes in House Report No. 1147 is, "Your committee thought these changes were in the interest of clarity."

It appears that the committee of conference obscured more than it clarified. It is apparent that the committee settled on the "equally well adapted" standard in the light of the disagreement of the House and the Committee on Water Power on an appropriate standard. And it is equally apparent that "hereunder" was transposed and "where no preliminary permit has been issued" was added to eliminate the municipal preference with respect to licenses that were issued pursuant to outstanding preliminary permits, as Merrill had suggested to the Committee on Water Power.

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[25] House Report No. 1147, 65th Congress, 3d Session.

But the reference to "licenses where no preliminary permit has been issued" in conjunction with "preliminary permits" made it *appear* that the municipal preference applied only to the issuance of preliminary permits and some initial licenses; i.e., those where no preliminary permit had been issued. *In point of fact, there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.* In point of fact, the issuance of a successor or new license is the issuance of one "where no preliminary permit has been issued".[26] Therefore, Section 7 continued to provide a preference in favor of States and municipalities in all relicensings.

As will be seen, the language that emerged from the conference committee "in the interest of clarity" is the touchstone of the present controversy. The public power interests go back to Section 7 of the Administration Bill as introduced and argue that the municipal preference contained therein for all relicensings was never changed. The private power interests look to Section 7 as it emerged from the conference committee and argue that it contains no municipal preference for relicensings.

The report of the conference was adopted by the House but was still pending in the Senate when Congress adjourned on March 4, 1919. When the 66th Congress convened, a bill identical to that in the report of the conference was introduced as H.R. 3184 and, on June 24, 1919, was reported without

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[26] The language creates a latent ambiguity in a situation in which a successor license would follow an initial license which, in turn, would follow a preliminary permit. It would seem, however, that the reference to no preliminary permit having been issued means a permit immediately preceding the license under consideration, that is still outstanding. If the committee had said, instead,

> That in issuing preliminary permits or licenses, other than licenses pursuant to outstanding preliminary permits, . . .

then, perhaps, the controversial Pinchot/Lenroot/Jones amendment, *infra*, would not have been necessary.

change to the Committee of the Whole House. On the floor of the House, Congressman Sinnott proposed an amendment that would permit States and municipalities to amend their plans to make them "equally well adapted" to those of competing private applicants so that such public applicants would not be foreclosed from obtaining licenses because their plans were not as well adapted. The amendment was approved on July 1, 1919, and Section 7 then read,

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, *or shall be made equally well adapted*, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The House-approved bill was referred to the Senate and was reported out of the Committee on Commerce with amendments on September 12, 1919. Senate Report No. 180, 66th Congress, 1st Session, states in this connection,

> Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development with ultimate public ownership possible.* [Emphasis added.]

Section 7, as reported to the Senate, provided,

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor

> by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall *within a reasonable time to be fixed by the commission* be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region *if it is satisfied as to the ability of the applicant to carry out such plans.*

Although the report of the Committee on Commerce does not explain how the phrase "and in issuing licenses to new licensees under section 15 hereof" came to be added to Section 7, it was added as a result of the following events: Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, had introduced a water power bill (S. 152) in which Section 7 was identical to Section 7 of the bill reported out of conference in the previous session. Senator Lenroot, a conservationist, had introduced another bill (S. 1192) that was a pro-conservationist revision of the bill reported out of conference in the previous session. On June 25, 1919, Pinchot, who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Jones' S. 152 including, with respect to Section 7,

> The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose *surely*, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import. [Emphasis added].

Pinchot took the suggested language from Lenroot's S. 1192, and that language, as suggested, was added to H.R. 3184.

We observe that there still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced. The intent as expressed by Pinchot was just the opposite—to clarify Section 7 so that the municipal preference

therein would "surely" apply to relicensings. If States and municipalities had such a preference against private initial licensee-applicants immediately prior to the amendment, and if "new licensees" refers to any licensees under a new license (as the public power interests contend), then the Pinchot/Lenroot/Jones amendment was of a clarifying nature, as Senate Report No. 180 characterized most of the amendments therein. But if States and municipalities had such a relicensing preference immediately prior to the amendment, and if "new licensees" refers to any licensees except an original licensee (as the private power interests contend), then the Pinchot/Lenroot/Jones amendment would have restricted the scope of the municipal preference contrary to Pinchot's conservationist philosophy. Some of the private power interests recognize that inconsistency and, therefore, argue from the language of Section 7 that States and municipalities did not have such a relicensing preference immediately prior to the Pinchot/Lenroot/Jones amendment and, therefore, that amendment gave them a limited relicensing preference[27] consistent with Pin-

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[27] Limited to situations in which private initial licensees do not become applicants for new licenses—which the public power interests contend are situations in which projects are not worth relicensing. And limited to situations in which the Commission first determines not to issue new licenses to private initial licensee-applicants—which the public power interests contend require a non-existent two-step relicensing procedure. If there were such a procedure, they say, the Commission would first determine whether or not to issue a new license to the initial licensee; and, if it does so, the Commission would give a *de facto* preference to initial licensees, contrary to the legislative history opposing perpetual licenses. It should be noted, in this connection, that one of the principle [sic] purposes of the 1968 amendments to the FPA was to eliminate a three-step procedure by which Congress would approve Commission recommendations not to take over projects before the Commission would fix the terms of and issue new licenses. It should also be noted that it is the practice of the Commission to decide questions pertaining to the identity of licensees and the terms of contested licenses at the same time.

chot's conservationist philosphy. They contend that Pinchot proposed the amendment because there was either no municipal relicensing preference or an uncertain municipal relicensing preference in Section 7 in view of its silence with respect to relicensings. But that would have been a substantive rather than a clarifying change, as Senate Report No. 180 indicates. And although they also contend that the question of whether Section 7 contained a municipal relicensing preference became moot when Congress addressed relicensing in the Pinchot/Lenroot/Jones amendment, the existence or nonexistence of such a preference appears to continue to be material to the Commission's interpretation of the language of that amendment.[28]

The bill reported out of the Committee on Commerce was approved by the Senate on January 15, 1920, without change to Section 7, and the House and Senate versions were sent to conference. The Conference Report issued April 30, 1920 (House Report No. 910, 66th Congress, 2d Session) recommended that the House recede from its opposition to the Senate amendments, which were described therein as being "verbal changes" that were "desirable, as they clarify the text", with the exception that the last phrase added by the Senate would be revised to read, "if it be satisfied as to the ability of the applicant to carry out such plans."

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[28] The Initial Decision pertaining to the Walters Hydro-electric Development (*Carolina Power & Light Company*, Project No. 432), was based on the "plain meaning" of "new licensees" in Section 7(a) and suggests that the presiding judge did not understand the legislative history of the Pinchot/Lenroot/Jones amendment. The Initial Decision states, mimeo, at 10,

> While it is true that Mr. Merrill intended the preference to also apply in renewal proceedings against the original licensee, the fact remains that Congress changed the original text by adding the word "new" before licensee in Section 7(a). The Senate Committee on Commerce Report that added the word "new" offered no comments whatsoever on this amendment.

Merrill, under date of January 27, 1920, prepared a memorandum on the Senate amendments to H.R. 3184 which stated that the amendments to Section 7 "strengthen" it; and under date of April 27, 1920, prepared a memorandum for Congressman Lee, a member of the committee of conference, stating,

> In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and *in case of acquiring properties of another licensee at the end of a license period.* [Emphasis added.]

On May 4, 1920, Congressman Lee used Merrill's exact words to assure his colleagues with respect to the municipal preference (Dove, at 814), and the Conference Report was approved by the House on the same day.

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

> For development by agencies other than the United States preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.* [Emphasis added.]

As indicated, President Wilson signed H.R. 3184 on June 10, 1920.

THE PLAIN MEANING OF "NEW LICENSEES"

Section 7(a) of the FPA provides, in pertinent part,

> . . . [I]n issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities . . . .

While the public power interests contend that "new licensees" plainly are any licensees under new licenses, the public power [sic] interests argue that "new licensees under section 15" are

distinguished from "original" licensees, just as is done in Section 15(a). They say that a phrase used in different parts of a statute is to be given the same meaning throughout, unless the context clearly indicates otherwise,[29] and that a statute should be construed to give effect to all of its words.[30] And they conclude,

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), n.29, at 184.

THE 1968 AMENDMENTS TO THE FEDERAL POWER ACT

The FPA contains no provisions for renewing or extending licenses. As enacted in 1920 and reenacted in 1935, Section 14

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[29] Their reliance on Section 22 is proper because that provision, which pertains to a "new licensee" assuming Commission-approved contracts, distinguishes between an "original licensee" and a "new licensee" in the same context as Section 15(a). But their reliance on Section 7(c) is improper, first, because that provision was not enacted in 1920, but in 1968, and second, because that provision would not be changed by omitting the [*italicized*] words:

> Whenever . . . the Commission determines that the United States should . . . take over any project . . . the Commission shall not issue a new license *to the original licensee or to a new licensee* but shall submit its recommendation to Congress . . . [Emphasis added].

Similarly, their reliance on Section 15(b) is improper because that provision also was enacted in 1968 and uses "new licensee" in the same context as Section 15(a).

[30] They argue that the public power interests construe "to new licensees" as having no significance, so that the phrase would read, "in issuing licenses under section 15 hereof." The public power interests reply that "to new licensees under section 15" refers to long-term licenses under that provision, as distinguished from annual licenses thereunder which can be issued to the "then licensee". They say that annual licenses possibly could have been confused with long-term licenses if "to new licensees" had been omitted from Section 7(a).

gives the United States "upon not less than two years' notice in writing from the commission . . . the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects . . ." upon the payment of the net investment plus severance damages. If the United States does not do so, Section 15 authorizes the Commission to issue a new or successor license. And if the Commission does not do so "upon reasonable terms", Section 15 directs the Commission to issue annual licenses to the "then licensee" under the terms and conditions of the original or predecessor license "until the property is taken over or a new license is issued. . . ."

As a result of these provisions, a three-step takeover/relicensing procedure developed in the 1960's, as the 50th anniversary of the FWPA and the reality of expiring licenses approached. First, the Commission submitted information on expiring licenses to Congress together with its recommendations regarding takeover. Second, Congress considered and acted on the recommendations. And third, since no projects were taken over, the Commission considered and acted on the applications for new, or successor, licenses.

In 1967 the Commission proposed certain amendments to the FPA that would eliminate that three-step procedure and permit it to consider takeover recommendations and relicensing applications at the same time. The proposal was unopposed and, as enacted in 1968, added Sections 7(c), 14(b) and 15(b) to the FPA.[31] Under the new procedure, any Federal department or agency may recommend during the course of any relicensing

[31] The Act (Public Law 90-451) recited that its purpose was "to clarify the manner in which the licensing authority of the Commission and the right of the United States to take over a project or projects upon or after the expiration of any license shall be exercised." One substantive provision, that would have permitted the Commission to amend licenses to impose "further reasonable requirements", was omitted from the final bill.

proceeding that the United States take over the project or projects in question, and if the Commission agrees, it is required to submit its recommendation to Congress and may not issue a new license. But if the Commission does not agree, it is required, upon request by a Federal agency recommending takeover, to stay the effective date of its order issuing a new license to give Congress two years to consider takeover. Thus, Congress would consider only projects recommended for takeover, rather than all projects.

During the course of the hearings on the 1968 amendments the Commission's General Counsel testified with respect to the House and Senate bills (Hearings on H.R. 12698 and H.R. 12699, at 32),

> They are procedural bills designed solely to permit the recapture and relicensing determinations to be made efficiently and in harmony with the purpose underlying the limited term license. There has been no attempt to modify the substantive standards which the Commission is required to apply in determining whether or not to recommend recapture and in passing upon relicensing proposals.

and, at 34,

> Another issue which has received considerable attention in the Senate hearings relates to the substantive question of the relative rights of the existing licensee and other would-be applicants in a relicensing proceeding before the Commission in the event Congress does not act to recapture a project. The Commission bill does not attempt to deal with this question.

The report of the House Committee on Interstate and Foreign Commerce on the amendment bill (House Report No. 1643, 90th Congress, 2d Session) did not address the municipal preference of Section 7(a). The report of the Senate Committee on Commerce on the amendment bill (Senate Report No. 1338, 90th Congress, 2d Session), on the other hand, did address that preference, as follows:

> During the course of the hearings on S. 2445, your committee heard considerable testimony on the question

of whether the preference which is extended under subsection 7(a) of the Federal Power Act to States and municipalities in their application for a license for a new hydroelectric power project also extends to those cases where an existing private power hydroelectric project license has expired, and in addition to the original licensee's application for a new license, a State or municipality also files an application for the new license.

Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this area and the policy it now applies to implement the law.[32] In his letter of August 28, 1967, to the Vice President, submitting the proposal which became S. 2445, Chairman Lee White stated:

Under section 7(a) of the Federal Power Act the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has determined that the original licensee should not receive a new license. In those instances where the original licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant.

And further on in the same letter he said:

[Finally we have considered establishing an additional preference for the original licensee to apply in cases where a rival applicant could slighty better achieve the objective of the Act.][33] We believe that all other things being equal,

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[32] Contrary to the committee's expressed belief that the Commission's General Counsel's interpretation was then being applied as a work practice, the Commission is only now addressing the applicability of the municipal preference to relicensings for the first time in a proceeding under the FPA.

[33] The bracketed sentence was in Chairman White's letter and is added back to restore the context.

continuity in ownership and management is a value in itself which should be recognized and is to be recognized under the present statute. However, when another applicant demonstrates a superior ability to meet the congressional objectives, in our view no preference should assure the position of the original licensee.

If the original licensee files an application for a new license, unless the Commission finds that the project, with such modifications and conditions as it may prescribe, would not be best adapted to a comprehensive plan for improving or developing the waterway involved, the Commission then would issue to the original licensee a new license containing such modifications and conditions as it may find appropriate or necessary.

Continuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results. Granting of the license to a different licensee can only be justified when the existing licensee is unable or unwilling to carry out whatever modifications are found to be necessary for comprehensive development of the waterway or to meet the standards of the act.

Section 14 of the existing act expressly reserves the rights of the States and municipalities to take over any project by condemnation proceedings upon payment of just compensation. States and municipalities, therefore, have a priority which can be exercised by eminent domain before, during, or after relicensing. On the other hand, if the State or municipality does not exercise this priority, and the existing licensee is willing and able to develop, redevelop, and operate the project so that it would be best adapted to a comprehensive plan for improving or developing the waterway involved, the new license should be issued to the existing licensee.

Chairman Magnuson and Senators Hart, Brewster and Moss expressed their supplemental (minority) views, as follows:

S. 2445, introduced at the request of the Federal Power Commission, was designed merely to clarify the procedure to be followed upon the expiration of existing hydro-

electric power project licenses. No substantial changes in the Commission's licensing authority were intended in this amendment to the Federal Power Act.

For this reason, no provision was made in the bill for priorities or preferential rights on relicensing, and it is our opinion that the committee report should remain silent on this issue.

Under section 7(a) of the act, the Commission is instructed to give preference to applications by States and municipalities in issuing original licenses and "in issuing licenses to new licensees under section 15," the relicensing provision. It is not clear what this language means and *it has never received either formal administrative or judicial interpretation.* The publicly owned utilities interpret the provision to require application of their preference on relicensing, arguing that when an original license expires, a new license must necessarily be issued to a "new licensee." The privately owned companies disagree, arguing that if the original licensee is seeking relicense, he is not a "new licensee" and the preference should not apply. In fact, the privately owned companies content [sic., contend] that a preference should lie with the existing licensee. In addition, the rural cooperatives have requested a statutory amendment providing them with the same preference as public agencies, to apply on relicensing as well as original licensing [Emphasis added].

Succinctly stated, the issues are (a) whether the statutory preference for public development of our water resources applies on relicensing; (b) whether the public agency preference should be extended to rural cooperatives; and (c) whether the existing licensee should have a preference or priority on relicensing.

No attempt should be made to resolve these difficult questions without careful research and study and a clear understanding of the implications of any decision reached. The suggestions of the various parties go beyond the scope of the bill as presented to the Congress and this committee.

Furthermore, continuity of ownership and management, tax revenues, and employment opportunities, factors mentioned in the majority report, are not the criteria

> which the act directs the Commission to consider in the issuance of licenses. Similarly, nothing in the act indicates that it is in accord with the majority's view that granting of a license to a new licensee "can only be justified when the existing licensee is unable or unwilling" to carry out modification of the project. The standard to be utilized in the issuance of both licenses and relicenses is found in section 10(a) of the Federal Power Act.
>
> S. 2445 is primarily a procedural, housekeeping bill providing congressional direction for the relicensing process. The legal, constitutional, and policy questions raised in the majority report seriously change the tenor and import of this bill. Ony [sic., Only] administrative changes should be considered in this bill, and substantive changes in the Power Act, is [sic., if] needed or desired, should be considered at a separate time.
>
> For these reasons, we cannot subscribe to that portion of the report which relates to section 7(a) of the Federal Power Act.

The private power interests contend that the 1968 amendment of Section 7 was a reenactment of that provision and that Congress, by amending the FPA in 1968 with knowledge of the Commission's interpretation of the municipal preference, thereby approved the Commission's interpretation. They contend, additionally, that that interpretation cannot be changed now by Commission action. And they cite, among other decisions, *Kay* v. *Federal Communications Commission*, 443 F.2d 638 (D.C. Cir., 1970), at 646,

> [A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has Congressional approval.

PG&E, in its initial brief at 22, claims that the facts involved in the enactment of the 1968 amendments are essentially indistinguishable from the facts considered by the court in *Association of American Railroads* v. *Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1970), which is one of the leading cases on the subject. Santa Clara responds do that claim at 70 of its reply brief, saying that PG&E's claim is not

supported by the decision. This "doctrine of reenactment" is discussed *infra*.

The public power interests and the staff counsel take the position that the 1968 enactment of Section 7(c), pertaining to the procedures interrelating relicensing and takeover, was not a reenactment of Section 7(a), pertaining to the standards for selecting applicants, and consequently the "doctrine of reenactment" does not apply. They contend that there is no long-standing Commission application and consequent interpretation of the municipal preference in rulemaking or contested adjudicatory proceedings, as is required under the doctrine, and as proved by the fact that the Commission initiated this declaratory order proceeding for the purpose of developing a working interpretation of that preference. And they contend that while one committee report seemed to approve the Commission's General Counsel's interpretation, there is no proof that Congress as a body approved that interpretation.

LICENSE TRANSFEREES AS "ORIGINAL LICENSEES"

While all of the parties do not address the second issue for declaratory order specified in the order of May 3, 1979, all who address it except the staff counsel and Santa Clara appear to agree with one another that an assignee or successor licensee is an "original licensee" within the meaning of Section 15(a).[34] They cite Section 8 of the FWPA, which is now Section 8 of the FPA, as follows:

> That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all of the conditions of the license under which such rights are held by such licensee and also subject to all

[34] The Commission staff counsel says that the issue is moot if it is found that the municipal preference is applicable to relicensings against original licensees that are not States or municipalities.

> the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

The Hydro Group contends, in this connection, that the clear purpose of Section 8 is to place transferees in the shoes of original licensees. They argue: (1) that the Commission can issue new licenses under Section 15 only to "new licensees" and "original licensees", (2) that "new licensees" and "original licensees" are mutually exclusive, (3) that transferees are in possession of project works while "new licensees" are not, and (4) that if transferees are not "original licensees" the Commission has no authority to issue new licenses to them, which would produce an absurd result. And PG&E argues that the statutory language that

> . . . any successor or assign . . . shall be . . . subject to *all* the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee [Emphasis added] . . .

leaves no doubt that the treatment prescribed for "assigns" carries through "all the provisions" of the FPA, including Section 15.

Santa Clara contends, on the other hand, that PG&E is not the "original licensee" (in the sense of the first licensee) of the Mokelumne River Project because it is a transferee from the "original licensee",[35] stating,

> [S]ince the Section 15(a) term "then licensee" encompasses both an "original licensee" and a "present licensee",

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[35] PG&E was the first licensee of several projects that were consolidated under the docket number, or project number, of the Mokelumne River Project, as to which PG&E was a transferee licensee. As a result of the consolidation, PG&E became both a transferee licensee and the first licensee of portions of that project as then licensed.

and PGandE is clearly the "present licensee", PGandE cannot even claim the benefit of any possible 15(a)-7(a) exclusion of "original licensees" from the municipal preference. As something different from the "original licensee", PGandE would, without question, fall literally within the 7(a) municipal preference in renewal contests: ". . . in issuing licenses to new licensees."

APPLICABILITY OF SECTION 7(a) TO RELICENSINGS

Plain Meaning

We turn first to the question of the plain meaning of "new licensees" because we are admonished by some of the parties not to look at the legislative history if that term has a plain meaning in Section 7(a).

In *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Supreme Court reversed the Tenth Circuit (507 F.2d 743 (1974)) for its failure to consider the legislative history of the term "pollutant" as used in the Federal Water Pollution Control Act (FWPCA), stating, at 9,

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " [Citations omitted.]

Two years later, however, in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), the Supreme Court said, at 184, n. 5,

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. [Citation omitted.] Here it is not necessary to look beyond the words of the statute. *We have undertaken such an analysis* only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case . . . is not in accord with congressional intent. [Emphasis added.]

Coming closer to "home", the District of Columbia Circuit held in *Chemehuevi Tribe of Indians* v. *Federal Power Com-*

mission, 489 F.2d 1207 (1973), that steam plants are not licensable as such under the FPA, stating, at 124 (footnotes omitted),

> It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. . . . Under the "ordinary man" or "plain meaning" canon of statutory construction, petitioners argue, the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.
>
> In answering a similar argument, the Second Circuit has said:
>
> > We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.
>
> *Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose.* The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only where the words of the statute are ambiguous but also "when the literal words would bring about an end completely at variance with the purpose of the statute." [Emphasis added.]

Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a different meaning by following the reference in Section 7(a) to Section 15 of the FWPA, which is Section 15(a) of the FPA, suggest that there is a sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

But if that suggestion is not enough, we observe that the public power interests and the Commission staff counsel have failed to challenge a hypothesis that is implicit in the position of the private power interests—that the term "new licensee", which is used three times in Section 15(a), has a meaning that can be carried forward into Section 7(a). And we conclude that it has no such meaning because the contexts of usage are different.

Just as the private power interests follow the reference in Section 7(a) to Section 15(a), our analysis follows the reference in Section 15(a) to Section 14 of the FWPA, which is Section 14(a) of FPA. That provision is concerned with the subject of takeover upon or after the expiration of any license, and uses the term "licensee" eight times to refer to the citizen, corporation, State or municipality that is in possession of a project under an expiring or expired long-term license.[36] Section 14(a) also uses the term "United States" three times to refer to the government that must pay the net investment plus severance damages to the "licensee", and must assume certain contracts, before taking possession.

Section 15(a), on the other hand, is concerned with the subject of successor licenses if the "United States" does not, at the expiration of the "original license",[37] take over the project works of the "licensee"—using the term "licensee" in the same context as in Section 14(a) to mean the citizen, etc., in possession under an expiring or expired long-term license.

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[36] If a "licensee" is in possession under an expired long-term license, it would also be in possession under a current annual license since the FPA is designed to avoid gaps between long-term licenses.

[37] If the term "original license" as used in its first appearance in Section 15(a) does not refer to the expiring or last expired long-term license, which might or might not be the first license, then the Commission would have authority under Section 15(a) to relicense project works only once. A literal reading of "original license" to mean the first license in all cases would produce an absurd result that

Thereafter, Section 15(a) uses the term "original licensee" (instead of "licensee" as in Section 14(a)) two times to refer to the citizen, etc., that is in possession under an expiring or expired long-term license, and not necessarily the first licensee. And it uses the term "new licensee"[38] three times to refer to the citizen, corporation, State or municipality (in lieu of the "United States" in Section 14(a)) that must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, before taking possession.

In other words, "original licensee" and "new licensee" are used in Section 15(a) as correlative terms to describe a predecessor/successor relationship in a context of successive license terms.[39] Section 15(a) authorizes the Commission to issue successor licenses to any citizen, etc., eligible for an initial license.[40] And it is necessary to distinguish between the

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would bring about an end completely at variance with the purpose of the FPA.

Furthermore, it is appropriate to construe the words "original" and "new" consistently within Section 15(a) to have their same respective meanings preceding both "license" and "licensee".

[38] "New licensee" is an unfortunate choice of terms because an applicant for a successor license (that is not an "original licensee" in possession) does not become a licensee until the license is accepted *after issuance.*

[39] This interpretation disposes of the second issue raised in the Commission's order of May 3, 1979. An "original" licensee in the context of Section 15(a) is a predecessor licensee in possession, which status has no relationship to the question of whether that licensee is also the "original" or first (or initial) licensee in the context of Section 8, or an assignee or successor of the first (or initial) licensee.

[40] The municipal preference issue in this proceeding pertaining to the meaning of "new licensees" in Section 7(a) is not the only major issue spawned by the Pinchot/Lenroot/Jones amendment. It has been argued that in view of the words in Section 7(a) "in issuing licenses . . . under section 15 hereof", the Commission's authority in issuing successor licenses is limited to Section 15(a), excluding Sec-

"original licensee" in possession and a "new licensee" not yet in possession because a successor licensee must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, *only* if that successor is not also the predecessor licensee.[41]

Finally, Section 15(a) provides that if the United States does not take over the project works and the Commission does not issue a successor long-term license, then the Commission shall

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tion 4(e) pertaining to the issuance of licenses generally. Accordingly, it has also been argued that the Commission doesn't have to find under Section 4(e) that a successor license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired, and that a successor license is not subject to and need not contain the conditions that a departmental Secretary deems necessary for the adequate protection and utilization of the reservation. The issue was addressed in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, wherein the Commission indicated (mimeo, at 98) that Section 15(a) does not specify (1) *to whom* successor licenses may be issued (to citizens of the United States, associations of such citizens, certain corporations, States and municipalities), (2) *for what purposes* they may be issued (for constructing, operating and maintaining project works, or utilizing surplus water or water power) and (3) *on what jurisdictional bases* they may be issued (bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams), all of which are supplied by Section 4(e). The issue was not reached in Opinion No. 36 because the successor licensing therein was treated partly as an initial licensing and partly as a relicensing.

[41] Section 22, which is concerned with certain contracts for the sale and delivery of power, uses the term "licensee" once in the same context as in Section 14(a) to mean the citizen, etc., in possession, in a context in which it is not necessary to distinguish between the citizen, etc., not yet in possession. It also uses the correlative terms 'original licensee" and "new licensee" once each in the same context as in Section 15(a) when it is necessary to make such a distinction, for a successor licensee must assume certain contracts only if that successor is not also the predecessor licensee.

issue annual licenses to the "then licensee"—which is almost but not quite the same as the "licensee" in possession in Section 14(a) and at the beginning of Section 15(a), and the "original licensee" in possession thereafter in Section 15(a). Since the recipient of an annual license must always be in possession, a "then licensee" differs from a "new licensee" conceptually in that there is no need to distinguish between a successor in possession from one not yet in possession. And since annual licenses may succeed predecessor annual licenses as well as long-term licenses, a "then licensee" differs from a "licensee" conceptually in that it includes a citizen, etc., in possession under an expiring or expired *annual* license.[42]

There are two places in the FPA at which the terms "original licensee" and "new licensee" are used separately and not correlatively. The term "original licensee" is used in Section 8, *supra*,[43] to mean the first or initial licensee in the context of a single license term. Although the words "or otherwise" in Section 8 are inclusive enough to cover a successor licensee in the context of successive license terms, the words "any successor or assign . . . shall be subject to all the conditions of *the license under which such rights are held*" (emphasis added) appear to limit the overall context to a single license term. In other words, a Section 8 "original licensee" is a first or initial licensee within a license term, whereas a Sections 15(a)/22 "original licensee" is a predecessor licensee as between two license terms. The term "original licensee", when used alone in

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[42] Consistent with the interpretation of the word "original" herein, in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, the Commission (mimeo, at 191) interpreted the term "original license" in the proviso of Section 15(a) as distinguishing the expiring license from a "new license", "and not as referring to the terms imposed by the expiring license when it was originally issued."

[43] Section 8 uses the term "such licensee" in two places without an antecedent reference to "such". Nonetheless, "such licensee", like "original licensee", appears in context to refer to the first licensee.

Section 8, does not have the same meaning as the same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees", when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

Sections 15(a) and 22 are concerned with predecessor/successor relationships in a context of successive license terms. Section 7(a), as the Hydro Group concedes, is concerned with the standards to be applied by the Commission in choosing among applicants.[44] It is concerned with choosing applicants as licensees for the forthcoming license term, whether that is the initial term or a successor term. But like Section 8, and unlike Sections 15(a) and 22, it is concerned with the single license term under consideration. Accordingly, we conclude on the basis of the intrinsic evidence within the statute that Section 7(a) "new licensees" are those who may be chosen (i.e., the applicants) for the new or forthcoming license term, which

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[44] In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean, simply, "in considering applications of new licensees", or, as Santa Clara argues (*supra*, at note 15), "in determining whether to issue licenses to new licensees". See, also, note 38, *supra*, which indicates that "new licensee" is an unfortunate choice of terms.

status has no necessary relationship to the question of whether they are "new" or successor licensees as between two license terms in the context of Section 15(a). In any event, there should be sufficient doubt as to whether "new licensees" in the context of *Section 7(a) are* identical to a "new licensee" in the context of Section 15(a), to merit a look at the legislative history.[45]

Legislative History

Having concluded that a Section 8 "original licensee" may not be the same as a Sections 15(a)/22 "original licensee",[46] we turn to the legislative history to ascertain the identities of the Section 7(a) "new licensees". There are two principal aspects to scrutinize—the introduction of the Administration Bill, and the Pinchot/Lenroot/Jones amendment.

Upon its introduction, the Administration Bill provided in the first paragraph of Section 7, in pertinent part,

> That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities. . . .

Like Section 4(d) of the FWPA authorizing the Commission generally to issue licenses (which is now Section 4(e) of the FPA), there were no words expressly including or excluding successor licenses. The claims of the private power interests that the reference to "plans" for "developing" power limited

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[45] Although Section 7(a) is concerned with choosing applicants as licensees, we note that the Commission is directed to give preference to applications (documents) of States and municipalities, and authorized (not consistently) to give preference "as between other applicants". This is a further example of non-consistent language noted in othr parts of this Opinion and order.

[46] They are the same only when the "original" or first licensee under a license retains its status of being the licensee through the expiration of that license, thus becoming the "original" or predecessor licensee of the successor license.

the preference to initial licenses, are totally unpersuasive. The plans were to be adapted "to conserve and utilize . . . navigation and water resources", which includes operation as well as construction, and, therefore, refers implicitly to successor licenses as well as initial licenses. Considering that "in issuing licenses", without limiting words, refers to all licenses, and considering the intent concerning preferences that was expressed in Merrill's memorandum of October 31, 1917, it appears that the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses.

After the introduction of the Administration Bill, the first paragraph of Section 7 was amended, first, so that the municipal preference would apply to the issuance of preliminary permits (which can happen, if at all, only prior to the issuance of an initial license), and second, so that the municipal preference would *not* apply to the issuance of initial licenses associated with outstanding preliminary permits. Considering that there were no words expressly including successor licenses, and that words were added to include preliminary permits and exclude initial licenses associated with outstanding preliminary permits, the application of the municipal preference to successor licenses became obscured through the successive amendments.

Eventually, the Pinchot/Lenroot/Jones amendment changed the pertinent language to read,

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities. . . .

That amendment changed the context of the first 15 words significantly. Immediately prior to the amendment there still were no words expressly concerned with (either including or

excluding) the issuance of successor licenses and, consequently, the words of the Administration Bill "in issuing . . . licenses" continued to refer to all licenses. The words had been amended, however, to say "in issuing . . . licenses where no preliminary permit has been issued", thus excluding *initial* licenses that were associated with outstanding preliminary permits. But, as in the Administration Bill, they continued to apply silently to all successor licenses.

The Pinchot/Lenroot/Jones amendment introduced for the first time words that were expressly concerned with successor licenses. As a result, the first 15 words were limited in their application to preliminary permits and *initial* licenses, and the 11 words that were added applied exclusively to successor licenses. The official explanation, per Senate Report No. 180 (66th Congress, 1st Session), described this amendment as one of a general body of amendments that were "of a minor character" and made "more clear and certain the meaning of the House provisions."

The interpretation of the public power interests and the Commission staff counsel that "new licensees" are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation. The words were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment. The narrower interpretation of the private power interests that "new licensees" are limited to those not in possession, would have resulted in a substantive change and presumably would have been described as such in Senate Report No. 180. And the alternative justification of the private power interests that the amendment added a limited municipal preference on relicensing where none had existed before, also would have resulted in a substantive change and, additionally, runs counter to Merrill's memorandum of October 31, 1917, and other indicia of the existence of the preference.

Finally, the interpretation of the public power interests is consistent not only with the official explanation of the Pinchot/

Lenroot/Jones amendment, but also with the Merrill/Lee explanation of the FWPA as it emerged from the committee of conference and was passed by Congress and signed by President Wilson.

We turn, next, to the effects of interpreting "new licensees" one way or the other. Section 7(a) identifies three areas of potential competition for preliminary permits and licenses, as follows:

1. Preliminary permits
2. Initial licenses not associated with outstanding preliminary permits
3. Successor licenses

The three areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

Section 7(a) also describes two preferences, or standards, to be applied by the Commission in choosing among competing applicants in the foregoing three areas of competition. If the competitors are States or municipalities, the Commission is directed to give them preference over citizens and corporations if their plans are "equally well adapted". But "as between other applicants", or, stated another way, as among citizens and corporations *inter se* when the competitors are not States and municipalities, the Commission may give preference to the applicant with the "best adapted" plans.

The two preferences cover all of the possible combinations of competitors with the possible exception of competition among States and municipalities *inter se*. It could be argued that it was not necessary to cover such competition since the political process could be expected to resolve questions pertaining to the choice of the government entities that would develop water

power on behalf of the public.[47] But we believe that there is a silent prepositional phrase in the municipal preference, as follows:

> . . . The Commission shall give preference to applications therefor by States and municipalities *over applications by citizens and corporations*. . . .

With the addition of that phrase, we construe the second preference "as between other applicants" to mean "as between applicants other than States and municipalities, on the one hand, and citizens and corporations, on the other hand". With that meaning, the second preference would be applicable to competition among States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal, preference would continue to be applicable to competition between States or municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors.

If "new licensees" are any licensees under a successor license, as the public power interests and the Commission staff counsel contend, the application of the two preferences to the three areas of competition will provide a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the "equally well adapted" or the "best adapted" standard to the issuance of all (a) preliminary permits, (b) initial licenses not associated with outstanding preliminary permits, and (c) successor licenses, depending upon whether any applicants are States or municipalities. And there will be no gaps in any situation, except as intended.

The private power interests' position, on the other hand, that "new licensees" exclude "original licensees", will produce absurd results as well as a regulatory gap.

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[47] Whatever the expectation of Congress, we have experienced competitive licensings between States and municipalities *inter se*.

Counsel for the Hydro Group took the position in the oral argument (TR. 89-90) that under their view that "new licensees" exclude "original licensees", State and municipal "original licensees" *in possession* would not have a relicensing preference against citizen or corporation applicants *not in possession*. Since States and municipalities have an undisputed preference to preliminary permits and initial licenses, it is absurd to believe that Congress did not also give them a preference to successor licenses in those circumstances.

The private power interests also say that the municipal preference doesn't apply unless the "original licensee" in possession chooses not to file an application for a successor license—in which case a State or municipality not in possession could compete against a citizen or corporation not in possession, resulting in a routine application of the "equally well adapted" standard. It is even more absurd to believe that Congress gave States and municipalities *not in possession* a preference against citizens and corporations not in possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession.

The private power interests say, additionally, that if the "original licensee" in possession *does* file an application for a successor license, the municipal preference doesn't apply until the Commission first decides not to issue a successor license to the "original licensee". The problems with that position are threefold.

First, a State or municipality not in possession would nonetheless be competing against the "original licensee" in possession within a two-step relicensing procedure, one step to decide whether to issue the successor license to the "original licensee" in possession, and if not, the other to choose among

applicants not in possession. There is in fact no such two-step procedure.[48]

Second, competition between a citizen or corporation in possession and a State or municipality not in possession clearly is not covered by the second preference of Section 7(a).[49] If it is not also covered by the municipal preference, as the private power interests contend, then the Commission would have no standard to apply in deciding whether to issue a successor license to the "original licensee" in possession.

And third, a decision to issue a successor license to the "original licensee" in possession would, in effect, provide a relicensing preference for the "original licensee", contrary to the position of counsel for the Hydro Group in the oral argument. A relicensing preference in favor of an "original licensee" in possession is irreconcilable with the absence of statutory words or legislative history indicating that such a preference exists, and, particularly, with the private power interests' emphasis on the "plain meaning" of the statute.

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[48] While the private power interests rely on the 1968 amendments to the FPA because of Chairman White's statement to Congress, the fact is that those amendments were enacted to eliminate a three-step relicensing/takeover procedure, and the resulting procedure described in the legislative history of those amendments does not indicate that there would be two steps in relicensing. Indeed, Section 14(b), which was enacted in 1968, states that,

> the Commission shall entertain applications [plural] for a new license and decide them in a relicensing proceeding [singular] pursuant to the provisions of section 15. . . .

suggesting that all pending applications are to be decided at the same time.

[49] If the second preference said, "in other situations," it would have been a catch-all. But the words, "as between other applicants," refer back to the combinations of competitors (State/municipal v. citizen/corporation) covered by the municipal preference, as distinguished form [sic] the areas of competition (permits and licenses) to which both preferences are applied.

1968 Amendments

Having determined that the interpretation of the public power interests and the Commission staff counsel is supported by the legislative history, and that the interpretation of the private power interests produces absurd results and leaves a regulatory gap, we turn to the claim that Congress in 1968 precluded a subsequent change in the Commission's administrative interpretation favoring the private power interests.[50]

The private power interests would have us invoke a judicially-created doctrine that was called the "doctrine of reenactment" in *Association of American Railroads* v. *Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1977), at 493, a leading case that applied the doctrine. As its name implies, invocation of the doctrine requires a threshold reenactment of a statutory provision which, in this case, is Section 7(a) of the FPA. Although the first paragraph of Section 7 of the FWPA was reenacted in 1935 as Section 7(a) of the FPA, the private power interests do not base their claim on that reenactment and, in any event, the other requisites are not present with respect to that reenactment. They base their claim on the 1968 legislation amending Section 7 of the FPA to add Section 7 (c), but not reenacting Section 7(a).

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[50] One of the most troublesome aspects of that interpretation, if not *the* most troublesome one, is that the General Counsel's rationale has not surfaced in this proceeding. As a result, we have no basis for judging the merits of, or being persuaded by, his interpretation, other than through the documents submitted to him, namely, (1) the legal memorandum transmitted to the General Counsel on behalf of some private power interests with the O'Kelly letter dated December 19, 1966, and (2) the Ely opinion letter to the American Public Power Association dated March 24, 1967. Copies of the foregoing documents were transmitted to the Commission as attachments to the Assistant General Counsel's memorandum dated March 28, 1967, which stated, simply, "our view of the correct interpretation of section 7(a) . . . is similar to that contained in the O'Kelly memorandum."

Under the "doctrine of reenactment", when Congress is made aware of an administrative interpretation of a statutory provision and gives an affirmative indication of an intent not to change the meaning of the provision, Congress thereby precludes a subsequent change in the administrative interpretation of that provision. In addition to the requisite reenactment, *Association of American Railroads* suggests, at 493, that the administrative interpretation should be a "longstanding and unquestioned interpretation" in the course of the work of an agency, which we would distinguish from an administrative interpretation recited to Congress at committee hearings. *Association of American Railroads* also suggests, at 493, not only that Congress must have expressed its satisfaction with the interpretation, but also must have "affirmatively concluded that it should not be changed for the time being".

Securities and Exchange Commission v. *Sloan*, 436 U.S. 103 (1978), is, perhaps, the most recent Supreme Court decision on the "doctrine of reenactment". The Securities and Exchange Commission (SEC) had authority under the Securities and Exchange Act of 1934 to summarily suspend the trading of securities on national exchanges for a period of 10 days, and it consistently interpreted its authority as permitting trading suspensions for successive 10-day periods, resulting in some long suspensions. In 1964 Congress amended the Securities Exchange Act of 1934 to grant the SEC the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities on national exchanges, and in 1975 Congress further amended that Act to consolidate the two resulting statutory provisions into one. The SEC informed Congress of its practice, in conjunction with the 1964 amendment, and the Senate Committee on Banking and Currency indicated in its report (Senate Report No. 379, 88th Congress, 1st Session) that it understood and did not disapprove the SEC's practice. Nonetheless, the Supreme Court struck down the practice and refused to apply

the "doctrine of reenactment", stating, at 120, that the SEC made its practice known to at least one committee

> at a time when the attention of the committee and of the Congress was focused on issues [the expansion of powers over securities on national exchanges to securities traded over-the-counter] not directly related to the one presently before the Court. Although the section in question was re-enacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval [that is required].
>
> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

On the basis of the foregoing two decisions, among others not cited, we conclude that the private power interests' position is deficient in at least the following respects, any one of which is cause for declining to invoke the "doctrine of reenactment": (1) There was no reenactment of Section 7(a) after the Commission made its interpretation known to the committee. (2) The committee and Congress in 1968 were focusing on the non-controversial proposed procedures interrelating relicensing and takeover, not directly related to the controversial matter of the municipal preference. (3) Congress, and particularly the House (as distinguished from the Senate committee), was not shown to have been *generally aware* in 1968 of the Commission's interpretation. (4) The Commission's 1968 interpretation was not and is not a long-standing work practice.[51]

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[51] The Commission's interpretation of the municipal preference in a relicensing contest is inherently incapable of being a long-standing work practice because, as indicated, (1) the vast majority of initial licenses were issued for 50-year periods and did not begin to expire until the 1970's, and (2) this declaratory order proceeding was initiated for the express purpose of determining what the work practice will be.

Their position is so materially deficient in so many respects that we believe that it is appropriately characterized as a "red herring".

THE MUNICIPAL PREFERENCE IN RELICENSING DECISIONS

Section 7(a) of the FPA contains the standards to be applied by the Commission in choosing between or among applicants who are competing for preliminary permits and licenses for the same water resources. One standard is the "municipal" preference, which applies to competition between States or municipalities, on the one hand, and citizens or corporations, on the other.[52] If the Commission finds that the plans[53] of the State or municipality are "equally well adapted" as those of the citizen or corporation "to conserve and utilize in the public interest the water resources of the region", the Commission is directed by the statute to issue the preliminary permit or license to the State or municipality.

Several parties, including the staff counsel, interpret the municipal preference of Section 7(a) to be a tie-breaking concept. We agree. Simply put, for a preliminary permit or an

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[52] In the other, as between citizens and corporations, *inter se*, and States and municipalities, *inter se*, "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

[53] The words "plan" and "plans" are used in several contexts in the FPA. The references in Section 7(a) to "equally well adapted" and "best adapted" "plans", as well as the reference in Section 10(a) to "comprehensive plan", run to the physical and nonphysical aspects of proposals for the development, conservation, and utilization of regional water resources. The references in Sections 9(a) and 10(a), on the other hand, to maps, "plans", and specifications, run more narrowly to the physical and technical drawings, plans and specifications of a project.

initial license, if the competing applications are equal with respect to advancing the public interest, the tie is broken by granting to the State or municipal applicant the statutory preference.[54] We have determined that this preference similarly holds in relicensing cases.

Congress intended that a State's or municipality's entitlement to preference should depend upon an evaluation by the Commission of public interest factors reflected in the competing plans before the Commission. As Congressmen Doremus and Raker said on the floor of the House (Dove, at 623-5):

> MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.
>
> MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.
>
> MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

As discussed in previous sections, Congress envisioned probable private development of water power resources with ultimate public ownership possible.[55] The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects.

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[54] States and municipalities have a special opportunity under Section 7(a) to modify their plans to conform them to or make them better than any competing plans. Therefore, the municipal preference of Section 7(a) assures a State or municipality of being the successful applicant if it is able and willing to meet its competitors' plans on the merits. See 18 C.F.R. 433(g).

[55] Senate Report No. 180, 66th Congress, 1st Session, quoted on page [40a].

Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate the facilities.

As early as 1908, President Roosevelt's landmark Rainy River veto message sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time." And Merrill's memorandum of October 31, 1917, called for statutory "provisions that will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy."

Merrill's proposal for a purely discretionary municipal preference[56] was modified in its movement through Congress into a preference that is mandatory should the Commission, in the exercise of its judgment, determine, in the words of Congressman Doremus, that "the plans are adequate *to serve the public interest*". (Emphasis added.)

Congress in 1920 was focusing on our nation's water power sites and equated the "public interest" with the prompt development of those sites. But Congress provided for the possibility of eventual public ownership even where the private interests undertook the responsibility for that development. This possibility was made dependent upon an evaluation by the Commission, at the time a license expires, of how the public interest would best be served by choosing among the various alternatives.

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[56] See the first paragraph of Section 7 of the Administration Bill, quoted on page [33a-34a].

In sum, the Commission finds and hereby declares that the statutory scheme of the FPA is one in which a municipal or State applicant competing for a successor license against a citizen or corporate applicant is entitled by Section 7(a) to a preference if the Commission finds that the plans of the State or municipality are, in the words of Section 7(a),

> equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

Thus, in determining which competing applicant will receive a successor license, it is important to look not only at the "tie-breaker rule", but also to how the Commission will determine whether the plans are "equally well adapted". Put differently, whether there is a tie to be broken by municipal preference will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest.

The Commission does not have before it a record upon which a definitive statement can be made as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare. However, the record in this proceeding, the language of the statute itself, and the pertinent legislative history provide a basis for some generalizations about the public interest determination.

First, we believe the statute contemplates a broad assessment, evaluating both physical and nonphysical considerations when the public interest is assessed. Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense[57] to make beneficial public use of our nation's waterways. All

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[57] See Footnote 53.

licensed water power projects are required by Section 10(a)[58] to be best adapted physically and technically to utilize our nation's water resources for the benefit of the public and, to the extent that they also conserve those resources, to do so for the benefit of the public. We are specifically authorized by Section 10(a) to require modifications to secure plans (in the physical or technical sense) that will be best adapted to a comprehensive plan (in the nonphysical as well as physical sense) for beneficial public uses. Thus, a project must be "best adapted", physically and technically, to beneficial public uses no matter which applicant we select.

During the oral argument, the Commission staff counsel suggested (Tr. 146) that our assessment of the "public interest" should be as broad as the commerce clause of the Constitution, and the general counsel of the American Public Power Association expressed his agreement (Tr. 187). Without adopting that particular interpretation here, we agree with the characterization expressed by the attorney for Utah Power and Light Company (Tr. 190) that our decision ought to take into account "the public interest in its broadest sense."

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as

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[58] Section 10 provides, in pertinent part,

All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commence, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; *and if necessary in order to secure such plan the Commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.* [Emphasis added.]

economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Second, we believe that Congress did not intend the "public interest" to be static or frozen as of 1920. To the contrary, the legislative history of the FWPA shows that one of the reasons why Congress rejected perpetual licenses was to reserve for future generations the decisions as to which segments of the public would receive the benefits of our nation's water power resources. We believe that the "public interest" will vary with the circumstances and needs of the time period in which it is considered.

Third, public interest implications of competition in relicensing decisions can be even more complex and complicated than for initial licenses. When issuing *initial* licenses for unconstructed projects, we are permitting the utilization of then unused or underused water resources. Our choice between public and private applicants for *initial* licenses for unconstructed projects results in allocating the benefits of relatively inexpensive renewable sources of energy to either a segment of the public associated with the public applicant, or the private applicant or a segment of the public associated with it, none of whom are then receiving those benefits. But our choice between public and private applicants for *successor* licenses may result in *re*allocating the benefits of water power resources then in use from the private applicant, or a segment of the public associated with it, to the public entity and the segment of the public associated with the public entity. Moreover, transfer itself may have some effects, possibly disruptive, which are not present with initial licenses.

Fourth, our relicensing decisions may have important implications for the concentration and distribution of the benefits of hydropower, and it is important to keep in mind that FWPA was an outgrowth of a widespread belief—and an associated political movement—that had a basic tenet that the

benefits of hydropower should be spread widely. A basic goal of the FPA is to assure that hydropower benefits are enjoyed by as much of the public as possible.

As previously noted, it will be necessary to develop the information on which to decide whether Bountiful, Santa Clara and other municipalities are entitled to a preference, in competing for a successor license, and it is important that the Commission be provided with an adequate basis upon which to examine broad public interest considerations.

Parties are encouraged to address such additional areas of consideration as they contend are pertinent to our selection of licensees for particular successor licenses. We emphasize, in this connection, that the "public interest" standard of Section 7(a) has never been litigated in court and has been addressed in only a few Commission decisions.[59] It would, therefore, be premature to address the applicability, relevancy and materiality of particular areas of consideration. We would expect such factors to vary from case to case.

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[59] Although it has never been disputed that the municipal preference is applicable to initial licensings, and although the Commission has been issuing initial water power licenses for almost 60 years, there are no court decisions and few Commission decisions on the "public interest" standard of Section 7(a). In *Holyoke Water Power Co., et al.*, Project Nos. 2004 and 2014, 8 FPC 471 (1949), wherein it was said, at 487, that the preference under Section 7(a) "is not an absolute one", a municipality that was unable and unwilling to meet its competitor's plans was denied an initial license. And in *Pacific Northwest Power Company*, Project Nos. 2243 and 2273, 31 FPC 247 (1964); affirmed *sub nom Washington Public Power Supply System* v. *Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966); reversed on other grounds *sub nom Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), a Commission majority indicated by way of dictum, at 270, that after a hearing

> . . . we would then determine if preference accrues to the [municipality], and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these [competing licensing] applications. . . .

In the final analysis, it is left to the Commission to determine the "public interest" in the light of the facts and contentions in each particular application. The processing and consideration of the pending applications in which States and municipalities, and citizens or corporations, have requested successor licenses for the same water resources should go forward in the light of this declaratory order. Finally, the Commission's Opinion Nos. 36 and 36A (*Escondido Mutual Water Company, et al.*, Project No. 176), involving a successor license and discussed briefly in Footnote 10, are subject to a pending appeal.

By the Commission.

(S E A L)

/s/ Kenneth F. Plumb,
KENNETH F. PLUMB
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 88-A
Docket No. EL78-43

CITY OF BOUNTIFUL, UTAH
UTAH POWER AND LIGHT COMPANY
CITY OF SANTA CLARA, CALIFORNIA
PACIFIC GAS AND ELECTRIC COMPANY

Issued: August 21, 1980

ORDER DENYING REHEARING

Before Commissioners: CHARLES B. CURTIS, Chairman; GEORGIANA SHELDON, and GEORGE R. HALL.

On June 27, 1980, the Commission issued Opinion No. 88 in this proceeding for a declaratory order. There we determined that the preference in Section 7(a) of the Federal Power Act for states and municipalities is applicable against a non-state, non-municipal original licensee in a competitive relicensing proceeding, if the state or municipal applicant's plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region."[1] The members of the Hydroelectric Utility Company Group,[2] Carolina Power and Light Company, Montana Power Company, Pacific Gas and Electric Company, Utah Power and Light Company, and Wisconsin Power and Light Company have filed applications for rehearing urging us to vacate our order and reverse our determination. The "Public Power Parties", comprising the Cities of Santa Clara, California, and Bountiful, Utah, the Clark-Cowlitz Joint Operating Agency, and the American Public Power Association, have jointly filed an application for rehearing requesting that we delete from Opinion No. 88 the explication of the public interest standard that we must apply

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[1] 16 U.S.C. § 800(a) (1976).

[2] See Opinion No. 88 (issued June 27, 1980) (*mimeo* at [22a] n.14).

to decide, in any particular relicensing proceeding, whether a state's or municipality's plans are "equally well adapted".

The private power interests do not raise any new theories in their applications for rehearing. They argue in more detail about the background and legislative history of the Federal Water Power Act. The Commission has reviewed the arguments of the parties on the meaning of the legislative history as those arguments have been made initially and expanded upon in the various applications for rehearing.

As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

In light of all of the available evidence of the legislative intent, we concluded that the interpretation more consistent with the purposes of the statute is that the state/municipal preference is applicable against a "private" original licensee in relicensing competitions if the state's or municipality's plans are "equally well adapted", and we are not persuaded to change that conclusion. In addition, we find no merit in the rehearing application of the "Public Power Parties." Accordingly, we shall deny rehearing.

The Commission Orders:

The applications for rehearing submitted in this Docket No. EL78-43 are denied.

By the Commission. Chairman Curtis voted present.

(S E A L)

/s/ KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 80-7461

D.C. Docket No.
EL 78-43, ER 78-43
88 (80-2083 & 80-2275 Consol. in D.C.)
(80-1865 & 80-1871 Consol. in D.C.)

ALABAMA POWER COMPANY, UTAH POWER & LIGHT COMPANY, PACIFIC GAS & ELECTRIC COMPANY, THE MONTANA POWER COMPANY, WISCONSIN POWER & LIGHT COMPANY, and PACIFIC POWER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petitions For Review Of An Order Of
The Federal Energy Regulatory Commission

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Alabama Power Company, Utah Power & Light Company, Pacific Gas & Electric Company, the Montana Power Company, Wisconsin Power Company and Pacific Power & Light Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission is AFFIRMED.

September 17, 1982

ISSUED AS MANDATE: **DEC 06 1982**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7641.

ALABAMA POWER COMPANY, *et al.*, *Petitioners*,

versus

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

United States Court of Appeals
Eleventh Circuit

FILED
NOV. 12, 1982

NORMAN E. ZOLLER
CLERK

Petition For Review Of An Order Of The Federal Energy Regulatory Commission

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 17, 1982, 11 Cir., 198__, ____ F.2d ____).

(November 12, 1982)

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

PARTIES

The following were parties to the proceeding in the court whose judgment is sought to be reviewed:

PETITIONERS

Alabama Power Company, Inc.
The Montana Power Company
Pacific Gas & Electric Company
Pacific Power & Light Company
Utah Power & Light Company
Wisconsin Power and Light Company

INTERVENORS IN SUPPORT OF PETITIONERS

Appalachian Power Company
Arkansas Power & Light Company
Baltimore Gas & Electric Company
Carolina Power & Light Company
Central Maine Power Company
Connecticut Light & Power Company
Duke Power Company
Georgia Power Company
Hartford Electric Company
Holyoke Water Power Company
Idaho Power Company
Jersey Central Power & Light Co.
Louisville Gas & Electric Company
Minnesota Power & Light Company
New England Power Company
New York State Electric & Gas Co.
Niagara Mohawk Power Corp.
Northern States Power Company
Pennsylvania Electric Company
Pennsylvania Power & Light Co.
Portland General Electric Co.
Public Service Company of Indiana
Public Service Electric & Gas Co.
Puget Sound Power & Light Co.

South Carolina Electric & Gas Co.
Southern California Edison Co.
Union Electric Company
Virginia Electric & Power Co.
Washington Water Power Co.
Western Massachusetts Electric Co.
Wisconsin Electric Power Co.
York Haven Power Company

RESPONDENT

Federal Energy Regulatory Commission

INTERVENORS IN SUPPORT OF RESPONDENT

American Public Power Association
City of Bountiful, Utah
City of Santa Clara, California
Clark-Cowlitz Joint Operating Agency, Washington

PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Petitioner Utah Power & Light Company has no parent, subsidiaries or affiliates. Petitioner The Montana Power Company has no parent; the company operates several wholly owned subsidiaries, and is a stockholder of Pacific Northwest Power Company. This information is submitted pursuant to Rule 28.1 of this Court's rules.

The Federal Water Power Act, Ch. 285, 41 Stat. 1063 (1920)

EXCERPTS

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

"Public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include "reservations," as hereinafter defined.

"Reservations" means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws; also lands and interests in lands acquired and held for any public purpose.

"Corporation" means a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

"State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

"Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

"Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shal-

lows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

"Municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality.

"Government dam" means a dam or other work, constructed or owned by the United States for Government purposes, with or without contribution from others.

"Project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

"Project works" means the physical structures of a project.

"Net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair

return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, in so far as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall in so far as applicable be published and promulgated as a part of the rules and regulations of the commission.

SEC. 4. That the commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this Act.

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands. The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable

times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

(b) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(c) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The commission, on or before the first Monday in December of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Act, and in each case the parties thereto, the terms prescribed, and the moneys received, if any, on account thereof.

(d) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State, or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the

license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate of [sic] foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this Act: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (e) of this section, notice shall be given and published as required by the proviso of said subsection.

(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also

publish notice of such application for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(f) To prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof by licensees hereunder; to examine all books and accounts of such licensees at any time; to require them to submit at such time or times as the commission may require statements and reports, including full information as to assets and liabilities, capitalization, net investment and reduction thereof, gross receipts, interest due and paid, depreciation and other reserves, cost of project, cost of maintenance and operation of the project, cost of renewals and replacements of the project works, and as to depreciation of the project works and as to production, transmission, use and sale of power; also to require any licensee to make adequate provision for currently determining said costs and other facts. All such statements and reports shall be made upon oath, unless otherwise specified, and in such form and on such blanks as the commission may require. Any person who, for the purpose of deceiving, makes or causes to be made any false entry in the books or the accounts of such licensee, and any person who, for the purpose of deceiving, makes or causes to be made any false statement or report in response to a request or order or direction from the commission for the statements and report herein referred to shall, upon conviction, be fined not more than $2,000 or imprisoned not more than five years, or both.

(g) To hold hearings and to order testimony to be taken by deposition at any designated place in connection with the application for any permit or license, or the regulation of rates, service, or securities, or the making of any investigation, as provided in this Act; and to require by subpoena, signed by any member of the commission, the attendance and testimony of witnesses and the production of documentary evidence from any place in the United States, and in case of disobedience to a subpoena the commission may invoke the aid of any court of the

United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any member, expert, or examiner of the commission may, when duly designated by the commission for such purposes, administer oaths and affirmations, examine witnesses and receive evidence. Depositions may be taken before any person designated by the commission or by its executive secretary and empowered to adminmister oaths, shall be reduced to writing by such person or under his direction, and subscribed by the deponent. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(h) To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act.

SEC. 5. That each preliminary permit issued under this Act shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. Such permits shall not be transferable, and may be canceled by order of the commission upon failure of permittees to comply with the conditions thereof.

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any , as the commission shall prescribe in conformity with this Act,

which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

SEC. 7. That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States.

The commission is hereby authorized and directed to investigate and, on or before the 1st day of January, 1921, report to Congress the cost and, in detail, the economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, in view

of existing conditions, utilizing such study as may heretofore have been made by any department of the Government; also in connection with such project to submit plans and estimates of cost necessary to secure an increased and adequate water supply for the District of Columbia. For this purpose the sum of $25,000, or so much thereof as may be necessary, is hereby appropriated.

SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

* * *

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commis-

sion; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective states shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein pro-

vided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, that when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any license directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

(g) Such further conditions not inconsistent with the provisions of this Act as the commission may require.

(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and reimbursements of this Act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to lands within Indian reservations.

* * *

SEC. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to

property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided*, That such net investment shall not include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further*, That the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

SEC. 15. That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new

licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

* * *

SEC. 22. That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

Part I Of The Federal Power Act, *As Amended,* 16 U.S.C. §§ 791-823a (1976) (Excerpts)

§ 796. Definitions [FPA § 3 as amended]

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign

nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or fore-bay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such

investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter.

§ 797. General powers of Commission [FPA § 4 as amended]

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licenses in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted

for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the

Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of

developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation [FPA § 5 as amended]

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

§ 799. License; duration, conditions, revocation, alteration, or surrender [FPA § 6 as amended]

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and

calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.

§ 800. Issuance of preliminary permits or licenses [FPA § 7 as amended]

(a) Preference

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

§ 801. Transfer of license; obligations of transferee [FPA § 8 as amended]

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

§ 803. Conditions of license generally [FPA § 10 as amended]

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans, etc., to secure adaptability of project

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or

benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees

That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reason-

able annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(f) Reimbursement by licensee of other licenses, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees

affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations prohibited

Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

§ 807. Right of Government to take over project works [FPA § 14 as amended]

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter

at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) Time of applications for new licenses; relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its[1] does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

§ 808. New licenses and renewals; compensation of old licensee; licenses for nonpower use; recordkeeping [FPA § 15 as amended]

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms

[1] So in original. Probably should read "it".

and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the conditions that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or

other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

§ 815. Contract to furnish power extending beyond period of license; obligations of new licensee [FPA § 22]

Whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: **Georgiana Sheldon, Acting Chairman;**
Matthew Holden, Jr., and George R. Hall.

City of Bountiful, Utah	)	
Utah Power and Light Company	)	**Docket No. EL78-43**
City of Santa Clara, California	)	
Pacific Gas and Electric Company	)	

ORDER GRANTING INTERVENTIONS AND SETTING BRIEFING SCHEDULE
(Issued May 3, 1979)

The City of Bountiful, Utah (Bountiful) and the City of Santa Clara, California (Santa Clara) have filed petitions for a declaratory order determining that the preference provided under section 7(a) of the Federal Power Act[1] (Act) for a "municipality" within the meaning of section 3(7)[2] applies against a non-public "original licensee" in a relicensing proceeding under section 15.[3] Santa Clara's petition also raises the question of whether a present licensee who holds the license as an assignee or successor in interest[4] is considered an "original licensee" under section 15. The petitions have been consolidated in a single docket and notice has been issued.

[1] 16 U.S.C. § 800(a) (1976).

[2] 16 U.S.C. § 796(7) (1976). Of course, if the preference does apply for a "municipality", it also applies for a state. *See* section 7(a) of the Act.

[3] 16 U.S.C. § 808(a) (1976).

[4] See section 8 of the Act, 16 U.S.C. § 801 (1976).

Related Motions

Clark-Cowlitz Joint Operating Agency (CCJOA) has filed an application for license in competition with an application by Pacific Power & Light Co. (PP&L) for relicensing of its Merwin Project No. 935. CCJOA has petitioned for an order declaring that it is the preferred applicant for relicensing of the Merwin Project. In addition, CCJOA has petitioned to intervene in this docket and has moved that we consolidate its petition for declaratory order with this proceeding. PP&L, on the other hand, has filed motions seeking to postpone action in Docket No. EL78-43 indefinitely, pending resolution in the relicensing proceeding, after evidentiary hearings, of whether CCJOA has a preference over PP&L. Both PP&L's and CCJOA's pleadings seek relief that would go beyond the scope of the instant proceeding.

In this docket, we are faced with resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case. In this proceeding, we are not concerned with whether any particular applicant is a "municipality"; nor are we addressing whether any particular applicant's plans are (or within a reasonable time are made) as well adapted as another's are to "conserve and utilize in the public interest the water resources of the region." Those are the kinds of questions implicit in the pleadings of CCJOA and PP&L.

Our inquiry here is solely—assuming a particular competing applicant on relicensing is a "municipality", and assuming its plans are or are made equally well adapted as those of a non-municipal "original licensee"—whether that municipality has a preference over that non-municipality. This is the sort of generic issue, with potential effects on a broad range of persons and proceedings, which is particularly well-suited to decision in a proceeding for a declaratory order. Even if we should decide here that the section 7(a) preference does apply against an "original licensee" in relicensing proceedings, that determination would not foreclose either CCJOA or PP&L from addressing in the proceeding for relicensing of the Merwin Project the particular circumstances of CCJOA, PP&L,

and the Merwin Project, and whether CCJOA would be entitled to such a preference. Those are matters which may well involve material factual disputes between CCJOA and PP&L and which, in any event, would not aid our determination of the issue of law before us in this docket. For this reason, we will deny the motions of both CCJOA and PP&L. Each will have the opportunity to present its arguments on the legal question in this proceeding as an intervenor. In addition—assuming for the sake of argument that we decide the section 7(a) preference applies in relicensing cases—CCJOA and PP&L may litigate in the relicensing proceeding on the Merwin Project the separate, specific question of whether CCJOA is entitled to such a preference.[5]

Interventions

In addition to CCJOA and PP&L, the following entities have petitioned to intervene in this proceeding: the American Public Power Association, Carolina Power & Light Co., Georgia Power Co., the "Hydroelectric Utility Company Group" (an informal collection of 31 investor-owned electric utility companies that are licensees or hold interests in licensees), the International Brotherhood of Electrical Workers, The Montana Power Co., Pacific Gas & Electric Co., Utah Power & Light Co., and Wisconsin Power & Light Co.[6] The California Public Utilities Commission filed a notice of intervention. All have shown adequate reasons to be permitted to intervene.

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[5] We note also that this proceeding will not resolve whether either Bountiful or Santa Clara would be entitled to a section 7(a) preference, if there is one. Those issues must be resolved in the two separate relicensing proceedings in which they are respectively parties.

[6] Although Santa Clara also has petitioned to intervene, it is already a party, since it filed one of the petitions that initiated this proceeding.

Briefing and Schedules

The primary issue in this proceeding is whether the section 7(a) preference for states and municipalities applies against a non-public "original licensee" in a relicensing proceeding. The secondary issue is whether a licensee holding its license as an assignee or successor in interest of an earlier licensee constitutes an "original licensee" under section 15. These questions are solely matters of law, not fact, and thus do not require an evidentiary hearing. Accordingly, the issues will be resolved after receiving briefs from the parties. We will allow 60 days for initial briefs. (Parties who have already filed their legal arguments need not refile.) Reply briefs will be due 30 days later.

The Commission orders:

(A) The following entities are permitted to intervene in this proceeding, subject to the Commission's rules and regulations under the Federal Power Act: the American Public Power Association; the California Public Utilities Commission; Carolina Power & Light Co.; Clark-Cowlitz Joint Operating Agency; Georgia Power Co.; the Hydroelectric Utility Company Group; the International Brotherhood of Electrical Workers; The Montana Power Co.; Pacific Gas & Electric Co.; Pacific Power & Light Co.; Utah Power & Light Co.; and Wisconsin Power & Light Co. Participation of the intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions to intervene. The admission of the intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding.

(B) The parties to this proceeding and Commission staff counsel may file initial briefs no later than 60 days from the date of this order, and reply briefs no later than 30 days from the last day for filing initial briefs, addressing these issues:

(1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing

original licensee that is neither a state nor a municipality?

(2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

(C) The motion filed by Clark-Cowlitz Joint Operating Agency to consolidate with this proceeding the question of whether it has a preference over Pacific Power & Light Co. for relicensing of the Merwin Project is denied. The motion of Pacific Power & Light Co. to postpone action in this proceeding is denied.

By the Commission.

(SEAL)

Lois D. Cashell,
Acting Secretary.

Proceedings Currently Before the FERC Which Raise The Municipal Preference Question[1]

Project Name River (State)	Original, Private Licensee	Municipal Applicant(s)
Mokelumne Mokelumne River (California)	Pacific Gas & Electric	City of Santa Clara
Olmstead Provo River (Utah)	Utah Power & Light	(1) City of Bountiful (2) Utah Municipal Power Agency
Cresta N. Fork Feather River (California)	Pacific Gas & Electric	(1) Sacramento Municipal Utility Dist. (SMUD) (2) Northern Calif. Power Dist.
Merwin Lewis River (Washington)	Pacific Power & Light	Clark-Cowlitz
Weber Weber River (Utah)	Utah Power & Light	City of Bountiful

Proceedings Currently Before the FERC Which Raise The Municipal Preference Question[1]

Phoenix Stanislaus River (California)	Pacific Gas & Electric	Tuolumne Water District
Shawano Wolf River (Wisconsin)	Wisconsin Power & Light	City of Shawano
Haas Kings River Kings River (California)	Pacific Gas & Electric	SMUD

[1] Based on information provided by Commission staff.

Excerpts From 59 Congressional Record (1920) (Emphasis Supplied)

Senate—January 5

[. . . p. 1044]

Mr. LENROOT. It is a perpetual license unless the property is taken over and paid for.

Mr. WALSH of Montana. Or unless another license is given to some one else.

Mr. LENROOT. Then it must be taken over and paid for.

Mr. WALSH of Montana. Of course; by the *new licensee*. Of course, some provision should be made for the case of the expiration of a license when the Government does not desire to take it over and no one else wants a new license. That condition should be taken care of, and some provision should be made for it.

Mr. LENROOT. If the proviso of the Senate committee amendment is adopted it will then require the tender of a new license to be made to the original licensee, and if the tender is not made he will be entitled to a license from year to year under the original license grant. There is more than a mere matter of form in connection with this. Why should not the Government be free in this regard? The Government ought to be free at the end of the 50-year term to deal in a given case according as the circumstances of that case may exist at the end of 50 years. Fifty years is a long time.

Mr. WALSH of Montana. Mr. President—

The PRESIDING OFFICER. Does the Senator from Wisconsin yield further to the Senator from Montana?

Mr. LENROOT. Certainly.

Mr. WALSH of Montana. Why should not the commission be required at the expiration of the period to tender? That would solve the situation. Why should it be left to their option to tender a new lease?

Mr. LENROOT. That is the effect, because they are entitled to an annual license, unless they do tender a new one. There is no objection to that. That would bring the tender of a new license, of course, but the difficulty is that the licensee may refuse to accept it, and of course he will refuse to accept it in every instance where the terms of the new license are less liberal than the terms of the original license.

Mr. WALSH of Montana. That, of course, is quite obvious.

Mr. LENROOT. The only case under the language of the proposed amendment where the licensee would accept the new license is where the new license was against the public interest and in his favor more than the original license.

Mr. WALSH of Montana. Let me inquire of the Senator whether that is exactly right? A license is tendered to him by the commission very much more onerous than the original license, and he declines to accept it. Under the proposed amendment he would be entitled to a lease only from year to year, but it would be subject to be let to a *new licensee* at any time. So if he desired to continue the business, in order to insure the continuance of the business in his hands, he might be quite willing to accept one very much more onerous in its terms than the original license, recognizing that new bidders would come in at [1045] the end of the year, or sooner, and possibly take the property on the terms offered to him. So it does not seem to me that he would necessarily decline to accept, even though the terms were more onerous than the original lease.

Mr. LENROOT. Mr. President, he would decline to accept for the reason that the *new licensee* could not get the property on paying the net investment to the original licensee for anything like its worth to him, because there are provisions in the bill which require him, in addition to paying the value of the property, to pay the original licensee what are known as severance damages.

Mr. WALSH of Montana. Of course, that is an entirely different feature of the bill.

Mr. LENROOT. It is a different feature of the bill, but it goes to the fact that the provision for a *new licensee* is no protection to the public in so far as compelling the original licensee to accept a new license tendered by the Government is concerned.

Mr. WALSH of Montana. Of course, that is another feature of the bill that we shall have to take up as an independent proposition when we get to it.

Mr. LENROOT. But it has a direct bearing upon this, because it destroys the Senator's argument that it is a protection to the public because a *new licensee* must take over the property at any time at exactly the net investment.

Mr. WALSH of Montana. The Senator from Montana has been making no argument. I have not had the benefit of the consideration of this matter by the committee as has the Senator from Wisconsin; I am very desirous of having a proper bill enacted; and I was endeavoring to elicit information and to ascertain how the Senator's statement that this amounts to a perpetual license is exactly correct. It did not occur to me that it was.

Mr. LENROOT. That is is a perpetual license I think the Senator will agree with me.

Mr. WALSH of Montana. The Senator from Montana will rely upon the Senator from Wisconsin with entire confidence in any effort he may make to fix a period for the licenses at not more than 50 years.

Mr. LENROOT. It can be done by refusing to adopt the Senate committee amendment inserting the words "which is accepted" and adopting the amendment inserting the word "tender" instead of "issue," which will make it very clear that it will be a 50-year license and that at the end of the 50 years a new license must be tendered or the property must be turned over either to the Government or to a *new licensee* or else the original licensee will be entitled to an annual lease until one of those three things is done. That I am in favor of.

Mr. NUGENT. Mr. President—

The PRESIDING OFFICER. Does the Senator from Wisconsin yield to the Senator from Idaho?

Mr. LENROOT. I yield.

Mr. NUGENT. I will say that I am in entire accord with the views expressed by the Senator from Wisconsin [Mr. LENROOT] in respect to the effect of the proviso contained in section 15 of the bill; but I desire to call the Senator's attention to what I believe to be the fact, that there is a direct contradiction as between the provision of the body of the section and that contained in the proviso. In the body of the section it is provided that—

> The commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations.

Under the proviso it is simply required that in the event the original licensee is not tendered a new license upon such reasonable terms as may be agreeable to him, then the commission shall issue to him under the original terms a license from year to year, utterly regardless of what the law may be at that time.

Mr. LENROOT. Exactly; and that was the next matter I was coming to in the discussion—the inclusion of the word "reasonable" in the amendment. Congress by the enactment of this proposed law would confer jurisdiction upon the courts not alone to determine the constitutionality of the law but to determine the reasonableness of the law itself—something that is entirely unprecedented in legislation; something that I do not think any Senator has ever before heard of in legislation.

The body of the section, as the Senator from Idaho [Mr. NUGENT] states, provides that "the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations." Then, in the proviso, it is

provided, in effect, that those laws and regulations must be reasonable; and it would give the courts the power to set aside a law of the Congress of the United States, not because it was unconstitutional but because, in the opinion of the court, it was unreasonable. So much for that.

Mr. CHAMBERLAIN. Before the Senator from Wisconsin passes from that, will he not indicate to the Senate just what changes he would make in the proviso in order to make it conform to his view?

Mr. LENROOT. Yes. I would adopt the committee amendment striking out the word "issue," in line 18, and inserting the word "tender," and refuse to agree to the Senate committee amendment in line 19, inserting the words "on reasonable terms," and the amendment in line 20, inserting the words "which is accepted," so that the proviso would read as follows:

> *Provided*, That in the event the United States does not exercise the right to take over or does not tender a new license to the original or a *new licensee*, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Mr. WALSH of Montana. Should not the word "issue" remain as applied to the *new licensee* and not simply the word "tender"?

Mr. LENROOT. I think "tender" would cover it. If they do not tender a license to the *new licensee*, then they can permit the old licensee to operate the property from year to year.

Mr. WALSH of Montana. Suppose they do tender it and it is not accepted.

Mr. LENROOT. If it is not accepted, should the original licensee desire so to do, he may continue from year to year.

Mr. WALSH of Montana. But if it is tendered to the *new licensee* and he does not take it the original licensee would not

have a right then to operate the plant from year to year. It must be issued to the *new licensee* in order to make the case.

Mr. LENROOT. I think "tender" makes the case. A tender protects the original licensee.

Mr. WALSH of Montana. I understand that; but let me cite a case to the Senator. A *new licensee* asks for a license and the license is tendered to him, but he does not take it. The conditions now exclude the original licensee from getting his year-to-year license.

Mr. LENROOT. I see the Senator's point. That, however, could, of course, be very easily remedied by making the proviso read "issue to the *new licensee* or tender to the original licensee."

Mr. FLETCHER. May I ask the Senator, if there is a tender of a new license to the *new licensee*, is it not fair to say that that tender of a new license ought to be on reasonable terms? Is there any objection to that?

Senate—January 12

[. . . p.1435]

Mr. SMOOT. In the first place, I want it distinctly understood that I am not in accord with the statement made that the bill gives away the last of the natural resources of the country. The bill gives away nothing. The company which develops a water power secures the money for so doing and runs all of the chances of the enterprise being a success or a failure. The Government of the United States takes no chances whatever. If it is not a paying proposition, the Government of the United States would still collect as much money as the contract calls for for every horsepower that is developed upon the project. Not only that, but the price at which the power [1436] can be sold is to be fixed, regulated, and controlled by officials of the Government; and I now state, as far as I am personally concerned, I would not want to take any interest whatever in any power project that may be undertaken under the provisions of the pending bill.

The pending bill is a compromise measure, just the same as the leasing bill was a compromise measure, and agreed to with a hope of future development of the natural resources of our Western States, which at the present time and for years past have been locked up and the situation absolutely controlled by the bureaus here in the departments at Washington, so that all development of water power ceased. If any person or persons undertake to develop a water power, even though the site be upon lands not withdrawn from entry, as soon as the announcement is made by the party who has concluded that a power plant could be successfully established, the Government of the United States, no matter how much money he has spent upon his preliminary work, immediately withdraws it, and all improvement ceases.

So, Mr. President, there is not very much of a gift found in the provisions of the pending bill, and there never can be a very great profit made out of any project developed under it. I think that more benefit will come to the country by the passage of

this bill from power plants developed upon navigable streams of this country than in the sparsely settled Western States, where the great inland water powers can be developed. I know of electric power companies investing large amounts of money in the development of power, and it has taken 10 years or more before even the running expenses of the company could be paid from the revenues received from the sale of the power.

I am not objecting to the regulation on the part of the Government, as provided in the bill; but I do think that every charge that is imposed upon every horse power generated will be passed on [to] the consumer, and at the same time the people living in the States where these power sites are located prevented from collecting taxes from withdrawn lands, in some cases reaching as high as 76 per cent of the area of the State, and that being so you can readily see that all the expenses of maintaining an orderly form of government must be met by the imposition of taxes upon the industries and improvements of the remaining 24 per cent of the area of the State. The Government of the United States holds its hand over that 76 per cent. No taxes can be imposed, no development can be made, and the State is barred from receiving any benefits of taxation.

The Senator asks if the Government does not take over the license at the end of 50 years, what is going to happen? If a *new licensee* does not take it over at the end of 50 years, what is going to happen? Why, Mr. President, if the Government will not take over the plant at the end of 50 years, and if it can not find a *new licensee*, it will be operated by the owners from year to year until the Government does take it over or finds a *new licensee*. What reason for complaint has the Government or the people if the plant is so uninviting that a *new licensee* can not be found or the Government itself decides it is not worth the taking over?

Why, Mr. President, is the privilege of allowing the owners of the plant to run it another year a special favor, a special privilege to the company that has put its money into the business and operated it for 50 years? Nonsense! The company may

only be making a profit of 1 per cent. It may be that it is making no profit at all, and under such conditions a *new licensee* would not want to take it over. Why should he? He can find better use for his money. If it is in such condition that the Government will not take it over, what disadvantage is there to the Government or the people if the man who has developed the property runs it for another year, and at the end of just one year's extension, if the Government will not take it over or a *new licensee* can not be found that will take it over, who is going to be hurt if it is operated by the owners? The Government will be getting its charges for another year. Every 12 months the same question will arise. Does any Senator think for a minute that a concern operating a plant of that kind wants to be put in that position, that it knows nothing about what is going to happen to its business at the end of every 12 months?

I want to say that the result will be that when a company constructs one of these plants, unless at the end of 50 years the Government wants to take it over, and it is profitable to do so, or unless the Government can find a *new licensee*, you can depend upon it that there has not been very much profit for the man who is operating it under the 50-year lease.

Mr. LENROOT. Mr. President, will the Senator yield?

Mr. SMOOT. Yes; I yield.

Mr. LENROOT. Would the Senator be willing, then, to vote for an amendment striking out the provision with reference to severance damages, so that the Government or a *new licensee* might take over this property at what it was worth to them?

Mr. SMOOT. Mr. President, the severance damages are nothing more than any honest man in a transfer of such property would agree to with any honest purchaser. It is nothing more nor less than the Government agreeing that in the severance of the property from the original licensee, whatever damages there might be should be paid by the Government in case the Government takes over the property, or the *new licensee* if there should be one, and I say that no honest person can object to that principle.

Mr. LENROOT. What would the *new licensee* get for the severance damages that he would have to pay?

Mr. SMOOT. He would get whatever value the required severance was to him, and that would be the severance damage to the builder of the plant. Mr. President, I want to say that all of the disadvantages in building the plant, the time it took to build up a demand for the power, and all of the burdensome unseen expenses of starting any kind of a business like the ones contemplated under this bill fall upon the original licensee. The man who asks for the second license has nothing like this to pass through. The business, if it is successful, is established at that time. He steps in without an effort, and it does seem to me he should be perfectly willing to pay a reasonable price, as the bill provides, whenever the property is transferred to him as a *new licensee*.

Mr. LENROOT. The Senator understands he has to pay all those expenses, too, does he not?

Mr. SMOOT. Well, there is not any question of a doubt whatever that the severance of the property will be decided between the Government of the United States, or the man who first built the plant and put it into operation, and the *new licensee*. The original promoter of the business, if he remains in it for 50 years, or, if he does not, his successors in business, are never going to secure any advantage in the severance of it, and I say now that if the Government of the United States at the end of 50 years does not take over the property there will be some good reason for it. If the Government of the United States can not find a *new licensee* to take over the property there will be some good reason for it, and that reason will be that it will neither pay the Government of the United States nor pay a *new licensee* to do so. So every interest of the Government is protected, and every interest of the *new licensee*, if there be one, will be protected; and it seems to me that all that the severance provision does is to protect the first licensee, who took the first step to establish the industry. I know there is no man living who would say that he should not be protected in this, and that is all the bill does.

In relation to the words "which is accepted," what does it mean and what is the result of their use? I can not see the result as portrayed by the Senator from Wisconsin. They mean that if a *new licensee* is not found that will accept the terms offered by the Government, then the original licensee can proceed from year to year to operate the plant. Do not think for a minute that that is a favorable position for the licensee to be in with ten millions of dollars invested or one million or whatever the amount may be, not knowing whether he will be allowed to operate on the 2d day of January of each year. I say that every endeavor would be made and every point stretched to the limit by the original licensee to keep the plant in operation. The original licensee is entitled to know if the offer of the Government to the second licensee is accepted; then I say that the words "which is accepted" ought to be in this bill, for not only the protection of the man who has put his money into the concern and made it a going concern for 50 years, but also, it seems to me, Mr. President, it is nothing more than right between the Government of the United States and a second licensee. Why should it not be known that it is acceptable to the *new licensee?* If a licensee will not accept it, why should the original licensee be deprived of operating the plant year by year? Do you want it to stand idle? Do you want it to go to rack and ruin until some *new licensee* is found by the Government?

That is all there is to it, Mr. President, and I hope and trust the amendment offered by the Senator from Minnesota will be agreed to by the Senate.